SUPREME COURT, U.S.

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APPENDIX

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-631

HOWARD JOHNSON CO., INC.,

Petitioner

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR
CERTIORARI FILED OCTOBER 9, 1973

PETITION FOR
CERTIORARI GRANTED DECEMBER 10, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-631

HOWARD JOHNSON CO., INC.,

Petitioner

vs.

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July 21, 1972	Plaintiff's Complaint filed in Wayne County Circuit Court for the State of Michigan
July 21, 1972	Temporary Restraining Order and Order to Show Cause Issued by the Wayne County Circuit Court for the State of Michigan
July 24, 1972	Hearing on Temporary Restraining Order and Order to Show Cause, Wayne County Circuit Court for the State of Michigan
July 26, 1972	Petition for Removal Filed by Defendant Howard Johnson, Co. Inc.
July 27, 1972	Answer of Defendant Howard Johnson Co. Inc. Filed
July 28, 1972	Motion to Remand or in the Alternative for Preliminary Injunction Filed by Plaintiff
August 7, 1972	Hearing on Motion to Remand or in the Alternative for Preliminary Injunction, United States District Court
August 22, 1972	Memorandum Opinion of the United States District Court Issued
August 25, 1972	Order of the United States District Court Entered
September 5, 1972	Notice of Appeal Filed by Defendant Howard Johnson Co., Inc.
September 7, 1972	Motion to Stay Order to Arbitrate Pending Appeal Filed by Defendant Howard Johnson Co. Inc.
September 28, 1972	Plaintiff's Answer to Defendant's Motion to Stay Order to Arbitrate Filed
October 2, 1972	Hearing on Motion to Stay Order to Arbitrate Pending Appeal, United States District Court

October 3, 1972	Memorandum and Order Granting Stay Pending Appeal Entered, United States District Court
October 11, 1972	Certified Record Filed and Case Docketed with Clerk of Sixth Circuit Court of Appeals
July 12, 1973	Opinion and Judgment of the Sixth Circuit Court of Appeals Entered

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, *Plaintiff,* vs. Howard Johnson Company, Inc., a Maryland corporation; Howard Johnson Motor Lodge, Inc., and Belleville Restaurant Company, Inc., Michigan corporations, *Defendants.*	Civil Case No. 218060

COMPLAINT

Filed July 21, 1972

Now comes, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter for matter of convenience, referred to as Union, by its attorneys, Miller, Klimist, Cohen, Martens & Sugerman, P.C., and files this Complaint against Howard Johnson Company, Inc., a Maryland corporation, Howard Johnson Motor Lodge, Inc., a Michigan corporation and Belleville Restaurant Company, Inc., a Michigan corporation, hereinafter for matter of convenience referred to as Howard Johnson, Lodge, and Restaurant, respectively, and says:

1. Jurisdiction of this court is based on Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Sec. 185, M.S.A. 17.454.

2. Plaintiff is a voluntary unincorporated labor organization which maintains its principal office and place of business at 100 Selden, Detroit, Wayne County, Michigan and is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work.

3. Howard Johnson is a Maryland corporation with its principal office at South Shore Plaza, 250 Granite Street, Braintree, Massachusetts and maintains a registered corporate office at 615 Griswold Street, Detroit, Wayne County, Michigan.

4. Lodge is a Michigan corporation that has at all times material herein operated a motel at 45945 Willow Run Expressway, Belleville, Wayne County, Michigan, providing lodging services to the travelling public.

5. Restaurant, is a Michigan corporation, that has at all times material herein operated a restaurant facility at 45915 Willow Run Expressway, Belleville, Wayne County, Michigan providing food services to the general public.

6. The Union, has been, at all times material herein, the recognized collective bargaining representative of certain employees of Lodge whose terms and conditions of employment are set forth in a collective bargaining agreement between the parties effective for the period August 1, 1968, to August 1, 1972. A copy of that agreement is attached hereto and marked Exhibit A.

7. The aforesaid Agreement between the Union and Lodge provides, *inter alia* as follows:

> "Article VII, Section 1. The Employer shall contribute to the Hotel and Restaurant Employees Insurance Fund the sum of forty-five ($.45) Cents per day from the first day of employment for each day worked, with a minimum of two Dollars ($2.25) twenty-five Cents per week for each week worked by steady employes[sic]. The Employer shall contribute to the Hotel and Restaurant Employees Insurance Fund the sum of forty-five ($.45) Cents per day for each day worked by all other employes[sic] covered by this Agreement. Such contributions shall be used for insurance coverage to provide benefits for employes[sic] eligible for benefits.
>
> "Article VII, Section 2. The Employer shall contribute, in addition to the contributions provided in the preceding Section, the sum of forty ($.40) Cents per day for each day worked by an employe[sic] covered by this Agreement to the Hotel & Restaurant Employes[sic] Pension Fund

for the purpose of establishing and paying pensions to eligible employes[sic] as provided in an Indenture of Trust establishing the Hotel & Restaurant Employes[sic] Pension Plan.

"Article VIII, Section 1. The Employer agrees to recognize seniority in specific job classifications within each department and that employees in specific job classifications within each department shall, whenever reasonably possible, be promoted, demoted, laid off and recalled to work according to their length of service. . .

"Article IX, Section 1. If an employe[sic] has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set forth. . .

"Article XVII, Section 1. Both the Union and Employer recognize the service nature of the Motel business and the duty of the Motel to render continuous and hospitable service to the public in the way of lodging, food and other necessary motel accommodations. There shall be no lockouts, strikes or work stoppages of any kind prior to the termination date of this Agreement. . .

"Article XVIII, Section 1. This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law . . . provided the establishment remains in the same line of business."

8. The Union is the recognized collective bargaining representative of certain employees of Restaurant. Terms and conditions of employment governing employees of Restaurant are set forth in a collective bargaining agreement between the parties, effective for the period January 1, 1968 to March 31, 1971, and extended by Addendum until May 1, 1974. A copy of the Agreement is attached hereto and marked Exhibit B. A copy of the Addendum is attached hereto and marked Exhibit C.

9. The aforesaid Agreement between the Union and Restaurant provides, *inter alia*, as follows:

"Article III, Section 1. If an employee has a grievance

under the terms and provisions and during the term of this Agreement, the same shall follow the procedure set forth below. . .

"Article V, Section 1. The Employer shall contribute to the Hotel and Restaurant Employes[sic] Insurance Fund the sum of $.45 per day from the first day of employment for each day worked, with a minimum of $2.25 per week for each week worked by steady employes[sic]. The Employer shall contribute to the Hotel and Restaurant Employers Insurance Fund the sum of $.45 per day for each day worked by all other employ es[sic] covered by this Agreement. Such contributions shall be used for insurance coverage to provide benefits for employes[sic] eligible for benefits.

"Article V, Section 2. The Employer shall contribute, in addition to the contributions provided in the preceding Section, the sum of $.40 per day for each day worked by an employe[sic] covered by this Agreement to the Hotel and Restaurant Employes[sic] Pension Fund for the purpose of establishing and paying pensions to eligible employes[sic] as provided in an Indenture of Trust establishing the Hotel and Restaurant Employes[sic] Pension Plan.

"Article IX, Section 2. The Employer agrees to recognize seniority in specific job classifications within each department and that employees in specific job classifications within each department shall be promoted, demoted, laid off and recalled to work according to their length of service, provided, however, that the employee qualifies for the specific job classification within the department.

"Article XIII, Section 2. This Agreement shall be binding upon the employer's successors, assigns, purchasers, lessees or transferres whether such succession, assignment or transfer be affected voluntarily or by operation of law; and in the event of the employer's merger or consolidation with another company or companies, this Agreement shall be binding upon the merged or consolidated company, provided the establishment remains in the same line of business.

"Article XIV, Section 2. The Employer will not lock-out any employees during the term of this Agreement.

"Article XV, Section 1. Nothing in this Agreement shall be construed to limit or impair the right of the Employer to exercise its own discretion on all of the following matters, whatever may be the effect upon employment, when in its discretion it may determine it advisable to do any or all of the following: . . . to discipline and discharge employees for cause. . .

"Article XV, Section 2. The Delineation of Management Rights shall be subject to the express terms of other provisions of this Agreement and to the Grievance Procedure."

10. By letter dated July 13, 1972, Restaurant notified the Union that it would terminate its business operations effective at midnight July 23, 1972. A copy of the letter is attached hereto and marked Exhibit D.

11. Although Lodge did not submit a written communication to the Union, it appears that it plans to cease its business operations on or about midnight July 23, 1972.

12. Lodge and Restaurant which have operated under the name and style of Howard Johnson Motor Lodge and Howard Johnson Restaurant, respectively, have entered into an understanding or agreement to sell their assets to Howard Johnson that will commence operations of the motel and restaurant facilities after midnight July 23, 1972.

13. Lodge employs approximately 23 employees who are represented for the purposes of collective bargaining by the Union. Howard Johnson, by its representatives, has informed said employees that they will be separated from employment at midnight July 23, 1972.

14. Restaurant employes[sic] approximately 35 employees who are represented for the purpose of collective bargaining by the Union. Howard Johnson, by its representatives, has informed 30 of said employees that they will be separated from employment at midnight July 23, 1972.

15. On or about July 19, 1972, representatives of Howard Johnson informed representatives of the Union that it would give no effect to any of the terms and conditions of employment set forth in the collective bargaining agreements between the Union, Lodge or Restaurant.

16. Howard Johnson, will continue the identical business operation of Lodge and of Restaurant under the same name and style and is a successor employer to Lodge and Restaurant.

17. Howard Johnson is required to arbitrate disputes arising under the terms and conditions set forth in the collective bargaining agreements between the Union and Lodge and Restaurant and may not, pending resolution thereof "lockout" the 53 employees involved at said facilities.

WHEREFORE, the Union prays that this court:

1. Order Howard Johnson, Lodge and Restaurant to arbitrate issues relating to separation of employment, seniority, health, welfare and pension contributions and the obligations of the parties under the successorship provisions of the collective bargaining agreements.

2. Preserve the status quo by temporarily restraining, ex parte, Howard Johnson from locking out the 53 employees employed at the motel and restaurant facilities involved in this proceeding.

3. Order Howard Johnson, Lodge and Restaurant to show cause why the aforesaid restraining order should not be made a preliminary injunction.

4. Order any other relief deemed just and appropriate.

MILLER, KLIMIST, COHEN,
MARTENS & SUGERMAN, P.C.

By /s/ DONALD F. SUGERMAN
Donald F. Sugerman
Attorneys for Plaintiff
2460 First National Building
Detroit, Michigan

July 21, 1972

* * *

AFFIDAVIT OF ROBERT CORRIGAN
Filed July 21, 1972
(Title Omitted in Printing)

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

ROBERT CORRIGAN, being first duly sworn, deposes and says:

1. That he is the Business Manager of Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, plaintiff herein.

2. That 53 employees of defendants, who are represented by plaintiff for collective bargaining purposes with regard to wages, hours and conditions of employment, will be irreparably harmed by the threatened action of the defendants to lockout from employment said employees.

3. That defendants will suffer no harm if a Temporary Restraining Order and Order to Show Cause are issued.

4. That he has read the foregoing Complaint of said plaintiff, that he knows the contents thereof and the same is true to the best of his knowledge, except as to matters therein stated on information and belief and as to those matters he believes it to be true.

Further deponent sayeth not.

/s/ R. G. CORRIGAN
Robert Corrigan

[Jurat omitted in print]

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. *Plaintiffs,* v. Howard Johnson Company, Inc., a Maryland corporation; Howard Johnson Motor Lodge, Inc., a Michigan corporation; and Belleville Restaurant Company, Inc., a Michigan corporation, *Defendants.*	Civil Action No. 38654

ANSWER OF HOWARD JOHNSON COMPANY, INC.
Filed July 27, 1972

Howard Johnson Company, Inc., one of the Defendants herein, by its attorneys Dykema, Gossett, Spencer, Goodnow & Trigg, answers the Complaint as follows:

1. This Defendant admits that the action is based on Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 185.

As stated in the Petition for Removal filed herein, Defendant avers that the United States District Court for the Eastern District of Michigan, Southern Division, has jurisdiction of this proceeding.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3 except as to the location of its principal office which is: One Howard Johnson Plaza, Boston, Massachusetts.

4. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 4 and leaves Plaintiffs to their proofs.

5. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5 and leaves Plaintiffs to their proofs.

6. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6 and leaves Plaintiffs to their proofs.

7. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7 and leaves Plaintiffs to their proofs.

8. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 8 and leaves Plaintiffs to their proofs.

9. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 9 and leaves Plaintiffs to their proofs.

10. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 10 and leaves Plaintiffs to their proofs.

11. This Defendant is without knowledge sufficient to form a belief as to the truth or falsity of the allegations in paragraph 11 and leaves Plaintiffs to their proofs.

12. This Defendant denies the allegations of paragraph 12 except that it admits that Belleville Restaurant Company, Inc. is one of several parties to a Bill of Sale whereby certain personal property is sold to this Defendant, which Bill of Sale was dated July 11, 1972.

13. This Defendant is without knowledge as to the truth or falsity of the first sentence of paragraph 13, and neither admits nor denies the same but leaves Plaintiffs to their proofs. This Defendant denies that it or its representatives have informed any employees of Howard Johnson Motor Lodge, Inc. that they will be separated from employment at midnight July 23, 1972, or at any other time.

14. This Defendant is without knowledge as to the truth or

falsity of the first sentence of paragraph 14, and neither admits nor denies the same but leaves Plaintiffs to their proofs. This Defendant denies that it or its representatives have informed any employees of Belleville Restaurant Company, Inc. that they will be separated from employment at midnight July 23, 1972, or at any other time.

15. This Defendant denies the allegations of paragraph 15 and states the fact to be that on July 11, 1972, it informed a representative of the Union that it would not accept or recognize any alleged contract for the Restaurant or Motor Lodge.

16. This Defendant denies the allegations of paragraph 16 and particularly denies that it is a successor employer to Howard Johnson Motor Lodge, Inc. or Bellleville Restaurant Company, Inc.

17. This Defendant denies the legal conclusion that it is required to arbitrate disputes arisimg under the terms and conditions of an agreement between Plaintiff and Howard Johnson Motor Lodge, Inc. or between Plaintifff and Belleville Restaurant Company, Inc. This Defendant further denies that it has "locked out" any employees.

WHEREFORE, this Defendant prays that the Complaint be dismissed with costs to it.

DYKEMA, GOSSETT, SPENCER
GOODNOW & TRIGG

By /s/ JAMES D. TRACY
James D. Tracy

Attorneys for Defendant Howard Johnson Company, Inc., a Maryland corporation
2700 Penobscot Building
Detroit, Michigan 48226
963-6040

Dated: July 27, 1972

Before the HONORABLE PHILIP PRATT,
United States District Judge,
Detroit, Michigan, August 7, 1972

STATEMENTS OF FACTS AND STIPULATIONS AND EXCEPTIONS TO STATEMENTS OF FACTS

(Title Omitted in Printing).

APPEARANCES:

BRUCE A. MILLER
Appearing on behalf of the Plaintiff

JAMES D. TRACY
Appearing on behalf of Defendant Howard Johnson Company, Inc.

FREDERICK COLOMBO
Appearing on behalf of Defendants Howard Johnson Motor Lodge, Inc., and Belleville Restaurant Company, Inc.

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[2] THE CLERK: Calling case Number 38654, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, versus Howard Johnson Company.

THE COURT: The record may indicate that the Court conferred with counsel in chambers on this matter and suggested that perhaps the matter could be determined on its merits if counsel could agree to a stipulation of facts.

Counsel have since that time conferred and I understand that there is to be some presentation in that regard.

MR. MILLER: Yes, your Honor.

If it please the Court, we have each attempted, independently of one another, to put together a statement of facts.

What I propose to do at this point, if it please the Court, is to offer, in the same general way that we did in chambers, my proposal as to what the operative facts are and see if we can get agreement on that. And then to hear out Mr. Tracy in terms of whatever additional supplemental facts [3] that he might want to offer, and see if we can get agreement on that.

If that is agreeable to the Court, then I will proceed.

THE COURT: Very well.

MR. MILLER: Thank you very much.

Let me first start, I think the easiest way of doing this is to just take the pleadings and take the admissions that have already been made and just put those on the record.

Do you have the pleadings in front of you, Counsel?

MR. TRACY: I do.

MR. MILLER: And do you have in front of you both the answer of Howard Johnson and the answer of the other defendants? And may we go right down that and proceed quite quickly?

Ready?

MR. TRACY: Yes.

MR. MILLER: Paragraph One of the complaint sets forth the jurisdictional averment, which is admitted.

So, I would offer that as part of our stipulated facts.

[4] If you disagree at any point, let me know, Mr. Tracy.

MR. TRACY: Very well.

MR. MILLER: Paragraph Two sets forth the nature of the plaintiff as a labor union, and that is admitted.

And I offer that as part of our stipulation.

Is that agreed, Mr. Tracy?

MR. TRACY: I thought you suggested if I disagreed, I should speak up.

MR. MILLER: Oh, all right; okay.

Let's just go right down and we will see, on the record, whether we are together.

We are together so far; okay?

MR. TRACY: Very well.

MR. MILLER: Paragraph Three sets forth the nature of the defendant Howard Johnsons. That was corrected by the answer of Howard Johnsons. And I think that the allegation as modified by the answer of Howard Johnson in their corresponding Paragraph Three, I would offer as a stipulation.

Is that agreeable, Mr. Tracy?

MR. TRACY: Yes.

MR. MILLER: Paragraph Four sets [5] forth the nature of defendant Lodge. And I am now turning to Lodge's answer, and Lodge admits that paragraph.

So, I offer that as part of the stipulation.

MR. COLOMBO: Your Honor, at this point, I would just like to correct something I just learned this morning, that there is no Howard Johnson Motor Lodge, Inc., as such. There is a Howard Johnson Motor Lodge that is a division of P.L. Grissom and Son, Inc., who is not a party to this suit. P.L. Grissom and Son, Inc., own all of the premises, the real estate where these businesses are conducted, and they also own all of the stock of Belleville Restaurant, Inc., which is a corporation and which is a party to this proceeding.

MR. MILLER: Well, I am not sure I understand Counsel. Are you saying that the party named as a defendant is not a legal entity and hence not a party to these proceedings?

MR. COLOMBO: Howard Johnson Motor Lodge, Inc., is not a corporation as such.

MR. MILLER: Well, who is the proper? Who stands in their place?

MR. COLOMBO: P.L. Grissom and Son, Inc.

MR. MILLER: And are they a party to [6] these proceedings?

MR. COLOMBO: No, they are not.

MR. MILLER: So, what you are saying is that we don't have a party on this side?

If it please your Honor, it is a little bit late to raise that kind of an issue, since we have already appeared in court and they have represented and they admit Paragraph Four.

THE COURT: Counsel, may we by stipulation amend the pleadings and the entitlement to show that correction?

MR. MILLER: I would agree to such.

MR. COLOMBO: We have no objection, your Honor.

THE COURT: Very well.

MR. MILLER: Then, we are all together.

Then, Paragraph Four, as amended, is admitted.

Correct, Mr. Colombo?

MR. COLOMBO: That's correct.

MR. MILLER: Okay.

MR. TRACY: Just a minute, Mr. Miller. Paragraph Four is not admitted.

MR. MILLER: As amended, it is admitted.

[7] MR. TRACY: Well, all right.

MR. MILLER: That is what I said, as amended, it is admitted.

Paragraph Five is admitted by that defendant.

Is that correct, Mr. Colombo?

MR. COLOMBO: What is Paragraph Five, sir?

MR. MILLER: Paragraph Five sets off the character of Restaurant as opposed to Lodge.

MR. COLOMBO: Belleville Restaurant, Inc., is a corporation in existence at this time.

MR. MILLER: So, that is admitted; and admitted by your pleadings.

Paragraph Six has been admitted by Mr. Colombo's pleadings, and I offer that as part of our stipulation.

That is a fact, it has been admitted; is that right, Mr. Colombo?

MR. COLOMBO: It is admitted by us as a fact.

MR. MILLER: All right. So, that is part of the stipulation.

Paragraph Seven is admitted by the [8] pleadings, and I offer that as part of our stipulation.

Any objection from any party?

All right.

I go on to Paragraph Eight. Paragraph Eight is admitted by the pleadings, and I offer that as part of our stipulation.

Is there any disagreement from anybody in reference to that?

THE COURT: I take it, Counsel, if there is any disagreement, they will let us know. So, just read what you want.

MR. MILLER: Paragraph Nine, I offer as part of our stipulation. It is also admitted by the pleadings.

Paragraph Ten, I offer as a stipulation that is admitted by the pleadings. And I would agree that if counsel has copies of those letters, I would have no objection to them being put into evidence.

Do you have copies of the letters?

MR. COLOMBO: Is this the notice letters?

MR. MILLER: Notice letters, that's right.

MR. COLOMBO: I think they are attached to the pleadings, aren't they?

[9] MR. MILLER: In that case, they are admitted.

Paragraph Eleven, this is a notice letter that is – it is alleged that a notice letter was sent out in connection with our Paragraph Eleven. We will be pleased to adopt your answer as part of our stipulation and agree to the introduction of that letter that is an exhibit which is attached to our complaint.

So, that is part of our offer.

THE COURT: An exhibit attached to their answer?

MR. MILLER: To their answer. Pardon me.

We accept that as being a fact.

We come down to Paragraph Thirteen, The first sentence of Paragraph Thirteen is admitted, "Lodge employs approximately 23 employees who are represented for the purposes of collective bargaining by the Union."

We offer only that sentence, which is admitted, as part of our stipulation of facts. We are not offering the last sentence, which is denied.

Paragraph Fourteen, the first sentence is admitted, "Restaurant employs approximately 35 employees who are represented for the purpose of collective [10] bargaining by the Union." That first sentence is admitted. The second sentence is not. We offer just the first sentence.

Paragraph Fifteen is admitted substantially by the defendant. That is, I don't – the only difference that I see between our fifteen and their fifteen is the date. They contend the proper date should be July 11th, we contend the proper date should be July 19th.

I believe it is a fact – let me just check, one minute.

I believe that both dates are correct, in that they involve a continuity of discussion starting with July 11th through July 19th and some time thereafter that.

And I would offer that as a stipulation in reference to Paragraph Fifteen.

That is all that is admitted in reference to the pleadings.

Now, I further offer the following as a stipulation of fact:

Defendants Lodge and Restaurant are operated under a franchise from Howard Johnson. These defendants returned the business to Howard Johnson through a sale of assets. They no longer operate the business and Howard Johnson now operates it under the same style, form and manner as it was [11] previously operated by defendants Lodge and Restaurant. From the point of view of the public, there is complete continuity.

Defendants Lodge and Restaurant were both, at the time of sale, bound by collective bargaining agreements; which are the agreements attached to the pleadings. Defendants reserve the right, in the event that arbitration is ordered, to offer agreements other than those in evidence, in the event that they learn that such agreements are not fully accurate.

That was to take care of the question that was raised in chambers.

Defendant Howard Johnson was not a party to the aforesaid collective bargaining agreements.

It is agreed that said agreements require arbitration of disputes and also provide for no strikes and no lockouts.

The total number of employees of Howard Johnson and Restaurant was 53. Those employees, except for the three former Union members, were released from employment effective 11:59 July 24, 1972. On 12:01 July 25th, Howard Johnson took over the former operation, with three former Union members employed by them.

The Court has the record of proceedings from the Circuit Court, except the transcript of the [12] proceedings before Judge

Gilmore, which record shall be the record for the question of remand.

The Court has as part of the file of this case the temporary restraining order issued by Judge Gilmore, and the order of Judge Moody dated July 26, 1972.

Defendants Lodge and Restaurant admit that they are bound to arbitrate, subject to whatever defenses they may allege, before an arbitrator; and further agree that an order requiring them to submit to arbitration should issue.

Defendant Howard Johnson denies any duty to arbitrate.

That is my proposed facts of stipulation.

THE COURT: Thank you.

MR. COLOMBO: As far as the defendants, on the record, now, P.L. Grissom and Son, Inc., who are the owners of what was formerly Motor Lodge and Belleville Restaurant, Inc., are concerned, your Honor, we have stipulated and agreed that we are subject to arbitration but only to those matters – only to those matters – which occurred prior to July 23, 1972, at 12:01 midnight. Anything that arose after that period, we will not stipulate as to any matter making us subject to arbitration with respect to those matters.

[13] THE COURT: Is that agreeable to you, Counsel?

MR. MILLER: Well, I don't think that I want to define the scope of that at this time, your Honor.

THE COURT: At least that is saved on the record.

MR. MILLER: It is saved on the record and for the arbitration.

MR. TRACY: If the Court please, I am James Tracy, appearing for Howard Johnson Company, Incorporated, which is a Maryland corporation.

As you stated, you suggested in chambers that this matter could perhaps be handled, rather than as the request on a motion

for temporary injunction, on the basis of an agreement facts going to final trial of the merits. And that seems to be in accord with Rule 65, Federal Rules of Civil Procedure.

We have no objection to that procedure.

We have assured the Court that we are willing to participate in any arrangement that will produce a quick legal determination of the issues involved.

There are, however, in my belief, some [14] complicated – perhaps not difficult, but complicated – legal questions. And, therefore, in order to protect my client's interests, I think it is important that the facts which establish the legal defense of this Company are all included in the record which the Court will have before it.

I heard Mr. Miller's statement. I think generally I found nothing with which my client disagrees.

I wish to make a statement of the facts as we deem them pertinent to the legal question which the Court will have to decide. And I will try not to repeat facts that I know Mr. Miller included in his statement, but there may be something in which I will repeat something that he mentioned.

As was noted, –

MR. MILLER: (interposing) Excuse me, Counsel. Would you prefer that I interrupt where I disagree? I don't want to interrupt your chain. I followed a certain method; I don't know if you want to follow the same method.

MR. TRACY: I will do it in any way the Court deems easiest.

THE COURT: Why don't you make your views known at the time.

MR. MILLER: Thank you. Silence [15] sometimes signifies assent, and I want to make sure.

MR. TRACY: I haven't identified my client. It has been noted on the record that there is not a legal entity called Howard

Johnson Motor Lodges, Inc., except as a division of P.L. Grissom Company, which I gather is a Michigan corporation. There is a Belleville Restaurant, as I understand it, and that is a Michigan corporation. My client, Howard Johnson Company, Incorporated, has no legal interest in either Howard Johnson Motor Lodges or Belleville Restaurant. And by that I mean they have no ownership interest on any kind. They have not at any time material to this proceeding had any such interest.

MR. MILLER: In reference to that fact, I would accept that as being true. And we will offer, in addition to that, that the two defendants operated under the control of Howard Johnsons through the operation of certain franchise agreements.

MR. TRACY: Well, your Honor, that is not a stipulated fact. I am agreeable to putting into evidence the agreements between Howard Johnson, and I will so identify my client.

MR. MILLER: Put in the franchise agreement, too, Counsel.

[16] MR. TRACY: I will be happy to put in the license which went to C.T. Grissom and P.L. Grissom, Inc., a Michigan corporation, dated December 7, 1959, to operate a Motor Lodge as a franchisee; and an operator's agreement dated August 18, 1960, to Ben Bibb and P.L. Grissom and Belleville Restaurant Company, jointly, to operate a restaurant.

I have one copy of those documents. I would be glad to make additional copies and submit them to the reporter to be made a part of this record.

MR. MILLER: Counsel, is that the same as a franchise agreement? If that is the franchise agreement, I am agreeable. If it is something that is extrapolated or is something separate from the franchise agreement, I am sure you are going to have that, and I am sure there will be no problem.

MR. TRACY: When Mr. Miller uses the term "franchise agreement," I don't know what he means. The documents I refer to were the only documents that were relative to the operation and the license arrangement. There is no document called a franchise agreement.

THE COURT: Is that satisfactory to you?

MR. MILLER: That is satisfactory [17] to me. But if the document makes reference to another document, I assume that document will be included.

Is that fair enough? We are going on faith here. I haven't looked. If that document makes reference to another document, then that document would also be included; is that correct?

MR. TRACY: No, I don't know either, because I haven't read the document myself. It may refer to a lease agreement or –

MR. MILLER: (interposing) Whatever that is, that will be included so it is complete. There is no problem there.

MR. TRACY: At the moment, your Honor, I don't know whether any other agreements are referred to therein. I have no objection to including them if they are material.

THE COURT: Very well.

MR. TRACY: On June 16, 1972, there was an agreement between Charles T. Grissom, Detroit, Michigan, and P.L. Grissom and Son, Inc., a Michigan corporation, jointly, and Belleville Restaurant Company, a Michigan corporation, jointly, who were referred to in the agreement as sellers, and Howard Johnson Company, my client, referred to in the Agreement as purchaser. This was an agreement which I would offer as part of our stipulated facts, which set forth the terms under [18] which there would be a transfer of certain assets by bill of sale, and it refers to certain contracts which were assumed by the purchaser. And, so, I propose that document as part of the stipulation.

MR. MILLER: If there is a representation that there is no other document as part of that transaction, then I will accept that as a stipulation.

MR. TRACY: That was the original agreement, so far as I know, that set forth the agreement. It called for the submission of an abstract of title. It was a preliminary agreement of sale, and it called for submission of other documents. It referred to the fact that it would be necessary to apply for a transfer of an existing

liquor license. As a matter of fact, there is no statement in this agreement as to when the transaction will be closed. And I believe that it was contemplated that the closing might be considerably later.

I am advised by Mr. Colombo, the attorney for the Grissoms, that there was a subsequent oral arrangement under which the transaction was closed, effective midnight July 23rd or 12:01 a.m. July 24th, without the transfer of the liquor license. The parties having agreed that they would proceed without that which was in the original agreement.

MR. MILLER: On the representation, if it please the Court, that all of the documents referred to may be exhibits in this case if they be material, and upon the [19] further representation that there are no other documents between the parties, I will accept that stipulation.

THE COURT: Very well.

MR. TRACY: I had not planned to put into this record all of the documents, but I have no objection. That means there will be, as part of this record, a bill of sale. There is a document entitled –

MR. COLOMBO: (interposing) There is a lease.

MR. TRACY: There is a document entitled a "Non-disturbance Agreement". And there are two leases. And I take it –

THE COURT: (interposing) Well, gentlemen, may I suggest that the two of you get together. Let's not talk on the record on a lot of unnecessary things. I would take it that most of those, in view of the fact that there was consummation of agreement at a certain time around midnight, that we won't need abstracts and other types of agreements. So, submit, then, just what is material to the issue before us.

MR. TRACY: I will submit the documents to Mr. Miller and be bound by his decision as to whether he thinks they should be part of the record. We will agree on what might go into the record.

MR. MILLER: No problem on that, I am sure.

[20] MR. TRACY: Very well.

There has been reference to the fact that on July 13, 1972, the plaintiff Union was advised by the other defendants in this case, defendants other than my client, that at midnight July 23, 1972, the Howard Johnson Motor Lodge, Inc., and the Belleville Restaurant Company, Inc., would terminate their business.

I am also advised by counsel for co-defendants that on July 9, 1972, a notice was delivered to each employee of those two companies, the Howard Johnson Motor Lodge, Inc., which is really, as we have now established, a division of P.L. Grissom and Son, Inc., and employees of Belleville Restaurant Company. And they are short, brief notices, but I believe they should be a part of this record.

MR. MILLER: No objection.

MR. TRACY: On June 28, 1972, Howard Johnson, my client, wrote a letter to Fred Colombo, Esquire, attorney for the sellers in this transaction, which stated in part, "It is understood and agreed that the purchaser, Howard Johnson Company, will not recognize and assume any labor agreements between the sellers, Charles T. Grissom and P.L. Grissom and Son, Inc., and Belleville Restaurant Company, and any labor organizations. It is further understood and agreed the purchaser does not assume any obligations or liabilities of the sellers resulting from any labor agreements or unfair labor practices."

[21] I would submit this letter – again a brief letter – to Counsel, and propose that it be part of the record.

MR. MILLER: If I can see the letter now.

If your Honor please, I agree that that is a fact. I do not agree that it is material, relevant or binding upon ourselves.

THE COURT: Very well.

MR. MILLER: In other words, I am not going to make an objection to its introduction, I am reserving our legal position but I want the facts here.

MR. TRACY: Well, there was, as part of this transaction, a lease signed on June 16, 1972. There may have been two leases. Pursuant to our previous discussion, these documents will be at least encapsulated for purposes of this record.

The agreements, the license agreement and the operating agreement of 1959 and 1960, were terminated as part of the agreement between the defendants. And that termination, I believe, was effective July 24, 1972.

On July 10, 1972, a representative of my client, Howard Johnson, commenced interviewing applicants for employment. I believe ads had been placed in local newspapers. Notices were posted, including posting in the Lodge and Restaurant [22], and interviews took place in an Ann Arbor motel, and the hiring process commenced.

On July 18th, the first employee was hired. On July 20th, the first employees were placed on the payroll of Howard Johnson, my client; and training of employees commenced on that day.

At July 24th –

MR. MILLER: (interposing) If your Honor please, could we have numbers?

MR. TRACY: Well, at July 24, 1972 –

MR. MILLER: (interposing) And where the training occurred.

MR. TRACY: Training occurred in the Howard Johnson facility at Ann Arbor, Michigan.

The numbers I have are that on July 24th there were 33 employees of Howard Johnson, my client, other than supervisors, in the Restaurant which on July 24th my client had commenced to operate.

There were 12 in the Motor Lodge which on July 24th my client had commenced to operate.

Of the 33 in the Restaurant, nine were former Grissom employees. And of the 12 in the Motor Lodge, none were former employees of Grissom.

There was a completely new group of supervisors who were employees of my client. None of the [23] supervisory personnel of the seller, the prior owner, the Grissoms, continued in the operation or is now working for Howard Johnson, my client.

Mr. Miller suggested as a fact that the operation continued exactly the same. We cannot stipulate that. We agree that the operation on July 24th was in the same building which had been – or buildings – which had been operated by the Grissoms on July 23rd and prior. We agree that the name was the same. In the Restaurant, there was a different menu; because Howard Johnson does operate in a manner differently from franchisees of Howard Johnson. Franchisees may formulate such menus as they choose. They may operate the restaurnat in ways that they choose. So, the method of operation as far as menus, food preparation, services, is different.

Now, those are the only reservations I submit relative to the sameness or similarity of the operation.

MR. MILLER: We cannot agree that that is factually correct. It is our understanding that the franchise agreement controls the detail, the type of furniture, what may appear on the menu, the style of clothes the people may wear, the type, the foremat[sic], the layout, the exterior, the shape, the form of the building, the use of signs, what the signs look like, how they are typed; as a matter of fact, supplied materials for that purpose. That any variations that occurred in the method of operation could be the same kind of operation [24] between Howard Johnson Restaurants as they would be between new owner or old owner in terms of improvement or refinement of services. They could have been the same things that could have happened between a Monday and Tuesday under the same owner.

We cannot accept that that is a distinction.

MR. TRACY: We are trying to reach a stipulation of facts and I will continue to exert every effort to reach agreement, but I

do not accept the statements Counsel has made. There is not in any franchise agreement a requirement as to the kind of uniform a waitress in a restaurant must wear. And, in fact, I believe the uniforms worn in this restaurant were different when operated by the Grissoms than they are now that it is operated by Howard Johnson.

THE COURT: Mr. Miller, I take it your position is based on what your understanding of the license or franchise agreement, or whatever it might be called, is. Is that correct?

MR. MILLER: It is based on the license or the franchise agreement and it is based on my actual knowledge as to what the actual practices under the agreement are.

I might say as an attorney I have no personal knowledge of that, I have to rely on somebody that can afford that information to me, and my advisor is a person who has been in this business longer than I have been a lawyer. [25] And he advises me that that is not his understanding that that is a fact.

I would wonder how material it is; because I would think that on the basic question that we are talking about, we are probably not that far apart. I would think on the basic question, somebody drives up to that Howard Johnson Restaurant or drives up to that Howard Johnson Motel, they are not going to know that there has been any change in the ownership of that establishment unless somebody hung a sign out to tell them. Because from the point of view of third parties, namely the public, the continuity in operation, I would say, would be dramactically evidenced.

I have been in enough Howard Johnson Restaurants in my life, I would think it is almost a matter of judicial notice that when you go to one, you go to them all. As a matter of fact, that is what they advertise.

MR. TRACY: If the Court please, I think that that gets to the area of argument rather than fact.

I have stated the building was the same; the name on the front was the same. I think I have properly stated to the Court facts which state the changes made by my client when it com-

menced operation. Whether the public would notice those changes or whether a stranger would know that something was different is not something that I am including in this stipulation of facts. But I think I have [26] properly stated the facts relative to the nature of the operation. We have the license agreement and the operator's agreement, and I will be happy to submit them to Mr. Miller and he may call to the attention of the Court any matters which relate to the method of operation which he desires to do.

MR. MILLER: All I can say, your Honor, on this aspect of the stipulation, we cannot at this time agree.

I will go into the matter further with my client; and if it does turn out we can agree, I will do so.

I would suspect that our difference is not material.

THE COURT: Very well.

MR. TRACY: On July11, 1972, a Mr. Robert Corrigan – who I believe is a representative of the plaintiff Union – had a telephone conversation with a representative of my client. And Mr. Corrigan was advised that Howard Johnson Company would not recognize any collective bargaining agreement with the Union for either the Restaurant or the Motor Lodge. The wording was, "The Howard Johnson Company does not accept or recognize any alleged contracts for either the Restaurant or the Motor Lodge or any successor clauses contained therein. It will not recognize the Union as the bargaining representative [27] for the Restaurant or Motor Lodge unless or until it is certified by the National Labor Relations Board as the bargaining representative of employees in an appropriate union."

I am further advised that Mr. Corrigan stated that he understood the position of the Company and stated, "It looks like we have trouble."

So, I make only the point that the Union was notified at that time.

MR. MILLER: We would agree that that is correct.

We disagree that the discussion was that legalistic.

We agree that Mr. Corrigan did put them on notice that that would mean trouble.

We do agree that they said they would not adopt the collective bargaining agreement.

We don't admit that anybody read to anybody a prepared statement about alleged practices and things like that.

To that extent, we have an agreement.

I would offer further that there were conversations between Mr. Sugerman and Mr. Burks later for purposes of again raising the issues that were raised with Mr. Corrigan.

[28] MR. TRACY: I do not know what facts Mr. Miller wants in this record relative to any discussion between Mr. Sugerman – who is an associate of Mr. Miller – and my client. I agree that there was a telephone discussion instituted by Mr. Sugerman on July 20th. He made some inquiries relative to whether Howard Johnson was going to operate. And there was a further call from Mr. Sugerman on July 21st, stating that he was planning to go to court.

Those, so far as I know, there are no facts that go to the legal issues that are to be decided by this Court which relate to those conversations.

But if Mr. Miller has some specific facts, I will be glad to listen to them.

MR. MILLER: We agree that that is correct.

We agree that we are in agreement now that these were further conversations between the parties.

MR. TRACY: I think it has been made clear that the notices to employees of the Grissoms were handled by the Grissom people; and that Howard Johnson, my client, had nothing to do with that.

There was an allegation in the complaint that we did terminate such employees; and we denied it; and Mr. Miller did not include that provision of the complaint in his stipulation. So I think

it is clear and will be made [29] clear by these notices.

Now, Mr. Miller also stated that this was a return to Howard Johnson of the operation of the Motor Lodge and Restaurant. And the fact is, my client had never had anything to do with that operation prior to July 24th, except as will be disclosed by the license agreement and the operator's agreement. That was the commencement of operation as far as my client is concerned.

Now, your Honor, as far as I know, those facts will include everything pertinent to the legal questions to be decided by you.

I think the basic legal question is: Is Howard Johnson Company, Incorporated, obligated to arbitrate, to participate in arbitration of disputes, under the two collective bargaining agreements which are attached to the complaint, which were between the Union and other parties, under the legal precedence involved; We are prepared to argue that question.

MR. MILLER: If your Honor please, with reference to Mr. Tracy's proposal, I accept that proposal except for those portions which I have already stated on the record I do not accept or which require further amplification.

I do believe that there are enough facts before the Court in which there is mutual agreement to frame the issue for the Court as to the legal question involved. And for that purpose, I am prepared to argue at this time.

[30] THE COURT: How much time do you gentlemen want on argument?

MR. MILLER: My argument will be extensive.

THE COURT: Let me put it another way. How much time do you think is necessary?

MR. MILLER: I would say at least half hour.

THE COURT: Mr. Colombo, I take it you won't need much time.

MR. COLOMBO: I don't believe, under these circumstances.

THE COURT: Mr. Tracy.

MR. TRACY: I don't think it would take me more than a half hour on my part, and maybe less.

Excuse me, your Honor, I don't want to interrupt your chain of thought. I know that both parties have submitted briefs to you already. Those were primarily aimed at the preliminary question which was presented on the motion which brought us here this morning. I do not know whether you contemplate further briefs on the ultimate question. I don't want to delay the proceeding, but it may well be that briefing should supplement the oral arguments.

THE COURT: Well, I can assure you that I will permit you to file any supplemental briefs, gentlemen. [31] And certainly there will have to be some work done on the documents so far as we mentioned, the exhibits.

Would Wednesday afternoon be long enough for you to do that?

MR. MILLER: To have the supplemental documents?

THE COURT: Supplemental documents and any briefs.

MR. MILLER: I would think so. As a matter of fact, I would think my argument would almost take the place of a brief.

THE COURT: Would you require any more time than that?

MR. TRACY: That would be satisfactory.

THE COURT: All right, we will plan it that way, then, gentlemen.

Well, gentlemen, we are going to have to adjourn now until 2:00 so I can adjourn my cases that I already have set this afternoon. We have six or eight pretrials set.

So, I think we will break now and meet again at 2:00 so that I can head off all those lawyers.

Court is in recess.

[Certification of Court Reporter Omitted]

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, *Plaintiffs,* v. Howard Johnson Company, Inc., a Maryland corporation; Howard Johnson Motor Lodge, Inc., a Michigan corporation; and Belleville Restaurant Company, Inc., a Michigan corporation, *Defendants.*	Civil Action No. 38654

MEMORANDUM OPINION
Filed August 22, 1972

(Memorandum Opinion of the United States District Court Appears as Appendix B, pages 13a - 26a of Petitioner's Petition for Certiorari)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, *Plaintiffs,* -vs- Howard Johnson Company, Inc., a Maryland Corporation; P. L. Grissom & Son, Inc. and Belleville Restaurant Company, Inc. Michigan corporations, *Defendants.*	Civil Action No. 38654

ORDER

Filed August 22, 1972

(Order of the United States District Court Appears as Appendix C, pages 27a-28a of Petitioner's Petition for Certiorari)

* * *

NOTICE OF APPEAL

Filed September 5, 1972

(Title Omitted in Printing)

Notice is hereby given that Howard Johnson Company, Inc., a Maryland corporation, the first Defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the Order requiring it and the other two Defendants to:

> "... arbitrate with Plaintiff, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, issues arising under the collective bargaining agreements between Plaintiff and Defendants, Belleville Restaurant Company, Inc. and P.L. Grissom & Son, Inc., effective January 1, 1968 and August 1, 1968, respectively, relating to the obligation and liability of Defendants to Plaintiff and to the employees represented by Plaintiff under the provisions contained in the aforesaid agreements pursuant to the Memorandum Opinion of the Court issued on August 22, 1972."

which Order was entered in this action on the 25th day of August, 1972.

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

By /s/ JAMES D. TRACY

James D. Tracy
Attorneys for Defendants
2700 Penobscot Building
Detroit, Michigan 48226
963-6040

Dated: September 5, 1972

* * *

MOTION TO STAY ORDER TO ARBITRATE

Filed September 7, 1972

(Title Omitted in Printing)

Defendant, Howard Johnson Company, Inc., by its attorneys Dykema, Gossett, Spencer, Goodnow & Trigg, pursuant to Federal Rule of Civil Procedure 62(a) and (c) moves this Court to stay the execution of its Order to Arbitrate dated August 25, 1972, pending the disposition of Defendant's appeal for the following reasons and upon the following grounds:

1. The legal question involved is a novel one of major significance to labor law. The Supreme Court has decided two cases *John Wiley & Sons* v *Livingston*, 376 US 543, 84 S Ct 909, 11 L Ed 2d 898 (1964) and *NLRB* v *Burns International Sec Serv Inc.*, 40 US Law Week 4499, S Ct, May 15, 1972, which raise serious legal questions as applied to the present case. These questions should be resolved by full appellate review, prior to Defendant being required to arbitrate.

2. Defendant will suffer irreparable financial detriment if required to arbitrate and if required to comply with an arbitrator's award, if it is subsequently determined that Defendant should not have been required to arbitrate in the first instance.

3. The detriment to Plaintiff and its members is not irreparable since a substantial number of employees of Defendants P.L. Grissom & Son, Inc. and Belleville Restaurant Company have already declined employment by Defendant Howard Johnson and any others could be made whole by monetary damages. On the other hand, any arbitration which would affect the rights of Defendant Howard Johnson's present employees would seriously prejudice them and they would be without recourse either before this Court or an Appellate Court.

4. Traditionally, appellate review of an arbitrator's award is very limited. Such review does not include the merits of the dispute unless the arbitrator has clearly exceeded his authority. However, at this time the district court has not specifically delineated the matters that must be arbitrated even though

arbitration has been ordered. A review at this time by the appellate process would serve to define that which is to be arbitrated.

Counsel for Defendant has sought, but has not been able to receive concurrence of counsel for Plaintiff to grant this motion.

Therefore, for the reasons above stated, Defendant respectfully requests that the Court stay the Order to Arbitrate it has granted until there has been full appellate review of its decision.

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

By /s/ JAMES D. TRACY
James D. Tracy

And /s/ RONALD J. SANTO
Ronald J. Santo

Individually and for the Firm
Attorneys for Defendant Howard
Johnson Company, Inc.
2700 Penobscot Building
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963-6040

* * *

PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION TO STAY ORDER TO ARBITRATE

Filed September 28, 1972

(Title Omitted in Printing)

NOW COMES Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, plaintiff herein, by and through its attorneys, Miller, Klimist, Cohen, Martens and Sugerman, P.C., and answers the Motion to Stay Order to Arbitrate filed herein by defendant Howard Johnson Company, Inc., as follows:

1. Answering Paragraph No. 1, plaintiff denies the same as a statement of fact and as a conclusion of law.

2. Answering Paragraph No. 2, plaintiff denies the same and further states that the plaintiff will suffer irreparable injury if defendant's Motion to Stay Order to Arbitrate is granted.

3. Answering Paragraph No. 3, plaintiff denies that a "substantial" number of defendants's employees were offered or have declined employment. Only six out of fifty-four employees have been offered employment and they have declined to accept employment with defendant, not because they do not want to work for defendant, but rather to support and demonstrate their unity with their forty-eight fellow employees who have not been offered their jobs back.

4. Further answering Paragraph No. 3, plaintiff denies that these employees could be made whole by monetary damages. Money damages are no substitute for an early resolution of this dispute by arbitration. Money damages cannot remedy the uncertainty which defendant's actions have injected into the lives of the employees, which uncertainty would only be aggravated and prolonged should this Honorable Court's Order to Arbitrate be stayed. More significantly, defendant's Motion ignores the obvious direct injury to the integrity of the grievance and arbitration procedure which plaintiff bargained for and won in its collective bargaining agreement in exchange for a no-strike pledge.

5. Further answering Paragraph No. 3, plaintiff denies the allegation with regard to defendant's "present" employees and

the alleged prejudicial effect which prompt arbitration would have on them. Only if the Arbitrator should order the reinstatement of the employees represented by plaintiff will defendant's present employees be prejudiced. That result, however, is speculation and conjecture at this point in the proceedings. However, even if the Arbitrator orders the reinstatement of the employees represented by plaintiff, that event will follow as a result of the actions of defendant complained of by plaintiff in its Complaint before this Court.

6. Further answering Paragraph No. 3, plaintiff admits that defendant's present employees would be without recourse as individuals. They would, however, be the beneficiaries of defendant's efforts before this Court and on appeal. In any event, as stated previously, even if they were without any recourse, their injury would come as a result of defendant improperly hiring them and would permit defendant to postpone its obligation to arbitrate because of its own conduct.

7. Answering paragraph No. 4, plaintiff denies that this Honorable Court has failed to adequately delineate the matters to be arbitrated and further denies that appellate review would serve to define that which is to be arbitrated. Moreover, the review sought by defendant on appeal does not propose to request the Court of Appeals to provide a clearer definition of the matters to be arbitrated. On the contrary, defendant has requested the Court of Appeals to reverse this Honorable Court's Order to Arbitrate.

WHEREFORE, plaintiff respectfully requests that defendant's Motion to Stay Order to Arbitrate be denied.

Respectfully submitted,

MILLER, KLIMIST, COHEN,
MARTENS & SUGERMAN

By /s/ DONALD F. SUGERMAN

Donald F. Sugarman[sic]
Attorneys for Plaintiffs
2460 First National Building
Detroit, Michigan 48226
965-7540

Dated: September 28, 1972

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Plaintiff,* vs. HOWARD JOHNSON COMPANY, INC., a Maryland corporation; HOWARD JOHNSON MOTOR LODGE, INC., a Michigan corporation; and BELLEVILLE RESTAURANT COMPANY, INC., a Michigan corporation, *Defendants.*	Civil Action No. 38654

MEMORANDUM AND ORDER GRANTING STAY PENDING APPEAL
Filed October 3, 1972
(Memorandum and Order of the United States District Court Appears as Exhibit D, Pages 29a-31a of Petitioner's Petition for Certiorari)

* * *

NO. 72-2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, *Plaintiff-Appellee,* v. Howard Johnson Company, Inc. *Defendant-Appellant.*	Appeal From The United States District Court For The Eastern District of Michigan

Decided and Filed July 12, 1973

(Decision of the United States Court of Appeals for the Sixth Circuit appears as Appendix A, pages 1a-12a of Petitioner's Petition for Certiorari)

* * *

**SALES AGREEMENT BETWEEN
P. L. GRISSOM & SON, INC. AND
BELLEVILLE RESTAURANT COMPANY AND
HOWARD JOHNSON COMPANY**

THIS AGREEMENT made and entered into as of the 16th day of June, 1972, by and between CHARLES T. GRISSOM, Detroit, Michigan and P.L. GRISSOM & SON, INC., a Michigan corporation, jointly and BELLEVILLE RESTAURANT COMPANY, a Michigan corporation, jointly, hereinafter referred to as the "Sellers", and HOWARD JOHNSON COMPANY, a Maryland corporation, having a principal office at 1 Howard Johnson Plaza, Boston, (Dorchester), Massachusetts 02125, hereinafter referred to as the "Purchaser".

The Sellers hereby agree to sell to the Purchaser, and the Purchaser hereby agrees to purchase from the Sellers, chattels, fixtures, furniture, furnishings, equipment, machinery, appliances, implements, utensils, silverware, china, linen inventory and all other personal property belonging to the Sellers and located in, or used in connection with a Howard Johnson's Motor Lodge located at 45945 Willow Run Expressway, Belleville, Michigan, and a Howard Johnson's Restaurant located at 45915 Willow Run Expressway, Belleville, Michigan or property more particularly described in Schedule I and II annexed hereto and made a part hereof, and the appurtenances thereof and thereto, respectively in the above mentioned and described premises, on the following terms and conditions:

I. The purchase price shall be the sum of Ten Dollars ($10.00) and the consideration of entering into these certain Lease Agreements as hereinafter set forth.

II. Concurrently with the delivery of the Bill of Sale, as hereinafter provided, the Sellers shall deliver to the Purchaser the following documents and instruments, all of which shall be duly executed and acknowledged, and be in recordable form:

A. Leases which shall be in the identical form and substance as the proposed Leases which have been intialled[sic] by the parties hereto and are hereto annexed, marked Exhibit "A" and Exhibit "B" respectively and hereby made a part of this Agreement, with the dates and other blanks appropriately filled in.

Said Leases shall be duly executed and acknowledged by the fee owner of the land, and by the Purchaser as Lessee.

B. Declarations of Lease which shall be in the identical form and substance as the proposed Declarations of Lease which have been initialled by the parties hereto and are hereto annexed marked Exhibit "C" and Exhibit "D" respectively and hereby made a aprt of this Agreement, with the dates and other blanks appropriately filled in.

C. Written agreements providing for the effective surrender, cancellation and termination of any and all leases affecting or covering the premises to be demised to the Purchaser under the Leases mentioned in Subdivision A of this Paragraph, or any part thereof.

D. Certified copies of resolutions adopted by, or certificates of vote by the Stockholders and Directors of the corporate Seller, approving and authorizing this sale and the execution and delivery of this Agreement and any and all other papers and documents related thereto or connected therewith.

E. An agreement in writing providing (a) for the effective surrender, cancellation and termination of the Motor Lodge License Agreement dated December 7, 1959, by and between HOWARD JOHNSON'S MOTOR LODGES, INC., a Delaware corporation, therein called "Company" and CHARLES T. GRISSOM and P.L. GRISSOM & SON, INC., therein called "Licensee", covering among other things, the operation of said Howard Johnson's Motor Lodge upon the said premises, as more particularly described therein, and (b) for the effective surrender, cancellation and termination of the Operator's Agreement by and between HOWARD D. JOHNSON COMPANY, a Massachusetts corporation, therein called "Company", and BEN BIBB and P.L. GRISSOM and BELLEVILLE RESTAURANT COMPANY, therein called "Operator" and covering among other things the operation of said Howard Johnson's Restaurant upon the said premises, as more particularly described therein.

III. Concurrently with the execution and delivery of this Agreement, the Sellers shall deliver to the Purchaser:

A. Copies of the latest existing title insurance policy from a reputable title company doing and authorized to do business in the State of Michigan, certifying the title and evidencing that the Lessor named in the Leases mentioned in Subdivision A of this Paragraph has good and marketable title to the fee of aforementioned and described free and clear of any and all liens and encumbrances of any kind or nature whatsoever.

Anything to the contrary, notwithstanding however the personal property, merchandise, chattesl[sic], fixtures, furniture, furnishings equipment, machinery, appliances, implements, utensils, silverware, china, linen and all other property to be sold, transferred and conveyed to the Purchaser pursuant to this agreement shall be delivered to the Purchaser free, clear and discharged of any and all mortgages, liens, encumbrances and debts whatsoever.

B. The latest prints or maps of a survey of each of the properties owned or leased by the Sellers, as aforesaid, which comprise the premises to be demised to the Purchaser as aforesaid.

IV. The Sellers hereby warrant and represent that at the time of the delivery of the Bills of Sale as hereinafter provided, the Sellers will have no creditors nor owe any money to any person, firm or corporation, except for unpaid real property taxes and personal property taxes. The Sellers hereby further warrant and represent that the Sellers have paid in full for all merchandise, chattels, fixtures, furniture, furnishings, equipment, machinery, appliances, implements, utensils, silverware, china, linen and all other property to be sold, transferred and conveyed to the Purchaser pursuant to this Agreement.

The Sellers hereby further warrant and represent that there are no claims, liens, encumbrances, taxes or violations of law or municipal ordinances or governmental orders, rules, regulations or requirements, upon, against or affecting the premises to be demised to the Purchaser, as aforesaid, or the said motor lodge and motor lodge business or the said restaurant and restaurant business, or any of the property hereby sold to the Purchaser, and the Sellers can and will convey and transfer same to the Purchaser free and clear of and from any and all claims, liens, encumbrances, taxes and violations as aforesaid, except for accrued but unpaid

real property taxes and personal property taxes hereinbefore mentioned or those set forth in the attached schedules and described in Paragraph III of the Agreement. Concurrently with the delivery of the Bills of Sale as hereinafter provided, the Sellers shall execute and deliver to the Purchaser an affidavit to the effect that the Sellers have no creditors and owe no money to any person, firm or corporation, and that the aforementioned premises to be demised to the Purchaser, as aforesaid, and said motor lodge, restaurant and all property hereby sold are free and clear of and from any and all claims, liens, encumbrances, taxes, and violations except as aforesaid. The Sellers hereby further convenant and agree that the Sellers shall and will hold the Purchaser free and harmless of and from, and will indemnify the Purchaser against, the claims of any creditors of the Sellers or any other person, firm or corporation, and of, from and against the payment of any liens, encumbrances or taxes which are or may be or become due from the Sellers, and of, from and against the removal and/or correction of any violations of law or municipal ordinances or governmental orders, rules, regulations or requirements, arising out of the Sellers' ownership, maintenance and operation of the aforementioned motor lodge business and the said demised premises and all property hereby sold or arising out of the sale, convenyance and transfer of the same to the Purchaser. The provisions of this Paragraph shall survive the delivery of the Bills of Sale.

V. The Sellers shall pay any and all taxes which are levied, assessed or imposed by any governmental authority having jurisdiction, upon or by reason of the sale, conveyance or transfer of any of the property pursuant to this Agreement or by reason of the Lease of said motor lodges.

VI. A. The Bills of Sale shall be in the usual form containing affidavits of title, warranty of title, and a warranty of freedom from any and all claims, liens, encumbrances and taxes, except those taxes payable after the delivery of the Bills of Sale and shall be duly executed and acknowledged by the Sellers. Said Bills of Sale together with the fully and duly executed and acknowledged documents, agreements, consents and papers mentioned and described in Paragraph II hereof, and the affidavit mentioned and described in Paragraph IV hereof, shall be delivered to the Purchaser at its office located at 220 Forbes Road, Braintree, Massachusetts 02184, thirty (30) days after the date of this Agree-

ment. In the event the Sellers shall fail, refuse or neglect to deliver said Bills of Sale, documents, agreements, consents, affidavits and papers thirty (30) days after the date of this Agreement, in a form and substance satisfactory to Counsel for the Purchaser, as aforesaid, the Purchaser shall have the right, at its election, to cancel and terminate this Agreement by written notice to the Sellers.

B. Within fifteen (15) days after delivery of said Bills of Sale, documents, agreements, certificates, consents, affidavits and papers to the Purchaser in form and substance satisfactory to Counsel for the Purchaser the Purchaser shall pay to the Sellers the purchase price of Ten Dollars ($10.00) aforementioned.

VII. If at the time for payment of the said Ten Dollars ($10.00) by the Purchaser to the Sellers, representing the purchase price as hereinbefore provided, any sums of money shall be due or payable by the Sellers to the Purchaser or any of the Purchaser's affiliates or subsidiaries including but not limited to Howard D. Johnson Company, Howard Johnson Motor Lodges, Inc., and Landmark Supply Corp. for any reason whatsoever, including but not limited to royalty fees and additional royalty fees under the aforementioned Motor Lodge License Agreements, or to the sale of goods, wares, merchandise or other personal property, or to payments under sign or reservation agreements or to services rendered, then and in such event, the Purchaser shall have the right and is hereby authorized to deduct and retain the entire amount that shall be so due or payable to the Purchaser or any of its affiliates or subsidiaries, as aforesaid, from said balance of the purchase price and the Purchaser shall be required to pay to the Sellers only the difference in full payment of the purchase price hereunder.

VIII. Concurrently with the receipt of said purchase price to be paid to the Sellers on delivery of the Bills of Sale, the Sellers shall deliver full and complete physical possession of the said motor lodge restaurant and of the said premises demised to the Purchaser, as aforesaid, and all the other property sold to the Purchaser, as aforesaid, free and clear of any and all claims of creditors or other persons, firms or corporations, taxes, liens, encumbrances and violations, except as aforesaid.

IX. Concurrently with the delivery of the Bills of Sale as hereinbefore provided, the Sellers shall assign to the Purchaser all of the Seller's right, title and interest in and to any and all telephone numbers, including but not limited to the telephone numbers, which presently are used in connection with the conduct, maintenance and operation of the said motor lodge, motor lodge business, restaurant and restaurant business, upon the said premises, and the Sellers shall execute and deliver to the Purchaser a written instrument evidencing and accomplishing such assignment, without cost or expense to the Purchaser.

X. All other items noramlly adjusted will be adjusted at the time of the execution of documents. The net adjustment will be paid within thirty (30) days of closing.

XI. This Agreement and the closing thereunder and the payment of the purchase price to the Seller are conditioned and contingent upon the obtaining of the transfer of the existing liquor license by the Purchaser from the governmental authorities having jurisdiction thereof which will authorize and permit the Purchaser to sell, purvey, dispense and otherwise distribute alcoholic beverages and alcoholic liquors of every kind, nature and description whatsoever for on-premises consumption in connection with the conduct and operation of the Restaurant business upon the premises to be demised to the Purchaser as aforesaid. The Seller has advised the Purchaser that the liquor license presently covering the said premises is in the name of BELLEVILLE RESTAURANT CO., INC. The Seller hereby convenants and agrees to cause said liquor license held by said BELLEVILLE RESTAURANT CO., INC., as aforesaid, to be transferred to the Purchaser without any cost or expense to the Purchaser so that the Purchaser will be authorized and permitted by the governmental authorities having jurisdiction thereof, to sell, purvey, dispense and otherwise distribute alcholic[sic] beverages and alcholic[sic] liquors of every kind, nature and description whatsoever, for on-premises consumption, in connection with the conduct and operation of the Restaurant business upon the premises to be demised to the Purchaser, as aforesaid. The Purchaser will make application for such liquor license and the Seller agrees to execute and deliver or cause to be executed and delivered any and all documents or other papers that may be required by the governmental authorities

having jurisdiction thereof. It is hereby further understood and agreed that in the event that after application to the governmental authorities having jurisdiction thereof, the Purchaser shall not have obtained or secured a transfer of the existing liquor license for the purposes aforesaid prior to October 1, 1972, or in the event that the governmental authorities shall fail, refuse or neglect to issue a transfer to the existing liquor license to the Purchaser for the purposes aforesaid, prior to October 1, 1972, then and in such event or events, the Purchaser shall have the right at its election, upon thirty (30) days written notice, to cancel and terminate this Agreement and thereupon the parties hereto shall be relieved and released of and from any and all obligations or liability thereunder, and all sums paid hereunder shall be returned to Seller.

XII. This Agreement may not be changed, modified, amended or altered except by a writing signed by the parties hereto, nor shall any waiver be valid or enforceable unless in writing, signed by the parties to be charged thereby.

XIII. The value of Seller's stock of liquor shall be determined by the a physical inventory thereof to be taken by two persons hereinafter referred to as the "Inventory Crew". One of whom shall be designated by seller and the other by purchaser. Said inventory shall be taken as hereinafter provided and shall include only such stock as is merchantable and saleable. The price of said stock of liquor shall be the net cost thereof to the seller. Said inventory crew shall submit to the seller and the purchaser, immediately after the completion of said physical inventory, a list in writing setting forth in detail the close stock of liquors together with the quanity[sic] of each such item and the price thereof. The total of said prices shall be the sum payable by the purchaser for said stock at the time the purchaser takes possession of the premises and commences operations. The purchase price for the liquor inventory shall be paid within fifteen (15) days after the transfer of the existing liquor license to the purchaser; provided, however, that the payment of the purchase price for said inventory shall not exceed Five Thousand ($5,000.00) Dollars.

XIV. The Lessee hereby agrees to assume and pay a certain indebtedness owed by Lessor to Landmark Supply, a wholly owned subsidiary of Howard Johnson Company and to hold

Lessor harmless therefrom; provided, further that the Lessor represents that the said sum due and owing to Landmark Supply does not exceed the sum of Nine Thousand ($9,000.00) Dollars.

XV. Lessee agrees to assume and pay any and all sums due and owing under the following contracts from and after the commencement date of those certain Lease Agreements as hereinbefore and hereafter set forth:

1. Detroit Terminals Advertising Co. for Howard Johnson Motor Lodge of Belleville dated April 12, 1972 and terminating May 16, 1973 with monthly payments of $280.00;

2. Central Advertising Company dated September 24, 1969, terminating October, 1972 with monthly payments of $525.00;

3. Eller Outdoor Advertising Co. dated February 21, 1970, terminating February, 1973 with monthly payments of $405.00;

4. Philco Ford Corporation dated May 28, 1971, terminating April, 1976 with monthly payments of $555.10 and option to purchase;

and to hold lessor free and harmless from any and all claims made by a party to said contracts.

IN WITNESS WHEREOF this Agreement has been duly executed by the parties hereto as of the day and year first above mentioned.

WITNESSES: P. L. GRISSOM & SON, INC.

By: /s/ P. L. GRISSOM
President

Attest:

/s/ CHRISTINE OLSEN /s/ CHARLES T. GRISSOM
Secretary

/s/ CHARLES T. GRISSOM (SEAL)
Charles T. Grissom

BELLEVILLE RESTAURANT COMPANY

/s/ CHRISTINE OLSEN By: /s/ P. L. GRISSOM
President

Attest:

/s/ CHARLES T. GRISSOM
Secretary

/s/ CHRISTINE OLSEN _____ (SEAL)
Ben Bibb

_____ /s/ P.L. GRISSOM (SEAL)
As to "Sellers" P.L. Grissom

HOWARD JOHNSON COMPANY

By: /s/ EUGENE J. DURGIS
Vice President

Attest:

/s/ JAMES M. SACCO /s/ JOSEPH V. CRONIN
As to "Purchaser" Asst. Secretary

* * *

HOWARD D. JOHNSON COMPANY
OPERATOR'S AGREEMENT

AGREEMENT made the 18th day of August 1960, by and between HOWARD D. JOHNSON COMPANY, a Massachusetts corporation, with a place of business in Quincy, Norfolk County, Massachusetts, (herein called "Company") and BEN BIBB and P. L. GRISSOM, both of Detroit, Michigan, and BELLEVILLE RESTAURANT CO., a Michigan corporation, jointly, (herein called "Operator"), owner, lessee or tenant of the premises described as follows:

> A certain tract or parcel of land situated in the Town of Belleville, Michigan, bounded and described as follows: That part of the N.E. 1/4 of Section 21, T. 3S., R. 8E., Van Buren Twp., Wayne County, Michigan, described as: BEGINNING at a point distant N. 88° 31' 15" E. 1134.06 feet and S. 0° 26' 45" E. 113.02 feet from the North 1/4 corner of said section and proceeding thence S. 0° 26' 45" E. 200.00 feet; thence N. 88° 31' 15" E. 230.00 feet; thence N. 0° 26' 45" W. 200.00 feet; thence S. 88° 31' 15" W. 230.00 feet to the point of beginning, containing 1.055 acres more or less.

Witnesseth That

WHEREAS the Company is engaged in the business of manufacturing and selling, under the name "HOWARD JOHNSON'S", ice cream, candy, foods, fountain syrups, and other commodities which are now or may hereafter be offered for sale or consumption in connection with or as incidental to the sale of such products, and containers, implements, equipment, merchandise and other articles used or useful in connection with the same; and

WHEREAS the Company, by reason of its maintenance of high standards of quality for the goods so manufactured and sold and for any goods of others offered for sale therewith and its maintenance of high standards of service in connection with such sale, whether sold at stores owned by the Company or at stores of others operated under supervision of the Company, has built up over a period of years a substantial demand for its products at supervised stores operated under the name "HOWARD JOHNSON'S," at which stores said standards of quality and service are maintained; and

WHEREAS the Operator, being fully informed as to the Company's good reputation and legal rights, desires, upon the terms and conditions hereinbelow set forth, to enter into the business of conducting a restaurant and/or dairy bar, and of selling at and from the premises above-described, under the name "HOWARD JOHNSON'S" and subject to the supervision of the Company, ice cream, candy, foods, fountain syrups, and other products manufactured or sold by the Company, and other merchandise of a quality approved by the Company, all in accordance with standards of service approved by the Company; and

WHEREAS the Company is ready and willing at the Operator's request to join in creating a new outlet for the distribution and sale of the aforesaid products, upon the terms and conditions hereinbelow set forth;

NOW, THEREFORE, the parties hereto, in consideration of the mutual agreements herein contained and promises herein expressed, and for other good consideration acknowledged by each of them to be satisfactory and adequate, do hereby agree as follows:

1. So long and only so long as this agreement shall remain in force and effect, the Company shall determine and approve standards of quality for all commodities bought, used or sold on the above-described premises, standards of service in connection with their sale, and standards of quality and utility for all furnishings and equipment used on said premises in connection with such sale, and the Operator shall conform to said standards, and the Company may supervise the operation of the Operator's business at the above-described premises. The Operator shall continuously operate the business on the above-described premises upon such days and during such hours as the Company shall determine. The Company's supervisory personnel shall have the right to enter upon the premises at any time for the purpose of examining the same, conferring with the Operator's employees, and inspecting and checking merchandise, furnishings, equipment, and operating methods, in all divisions and departments, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with this agreement.

2. So long as this agreement shall remain in force and effect, the Operator will purchase from the Company any and all products manufactured or sold by the Company which the Operator may need for use or sale at or from the place of business described above and the Operator shall pay therefor at standard prices from time to time fixed by the Company, in full, upon delivery at said place of business. The Operator will diligently promote and make every reasonable effort steadily to increase the sale of said products. There is attached hereto, marked "Schedule A", a list of the principal products now being manufactured or sold by the Company which conform to the aforesaid standards, but said list may at any time be added to or subtracted from by the Company. The Operator is not bound to purchase all supplies from the Company, except as aforesaid, but is bound to sell only goods which conform to the Company's standards. The Operator will not sell under the name "HOWARD JOHNSON'S" at or from the above-described premises any products other than those above-described, and will not sell at or from the above-described premises any products manufactured or sold by others than the Company unless the same conform to standards of quality approved by the Company.

3. So long and only so long as this agreement shall remain in force and effect, the Operator shall use the said premises exclusively for a restaurant and/or dairy bar business and may advertise the above-described place of business under the name of "HOWARD JOHNSON'S" and may use on said premises, in behalf of the Company, the Company's trade names, trademarks, designs, advertising, and form of structure. All advertising matter shall be submitted to and approved by the Company prior to publication. The Operator acknowledges the validity and the ownership in the Company of said trade names, trademarks, designs, advertising, and form and combination of color and structure, and agrees that upon termination of this agreement for whatever cause the permission to use the same as aforesaid and all interest therein whatsoever shall cease and be at an end. The Operator shall not allow the described premises or any part thereof to be used for any immoral or illegal purpose, and shall not allow, suffer or permit the same to be used for any purpose, business, activity, use, function or object not approved in writing by the Company.

4. If the above-described premises shall be under lease by the Operator from a third party, said lease shall be submitted to the Company for examination and no substitute or change in the lease, or assignment or sub-lease, shall be entered into by the Operator without the written approval of the Company.

5. If any building is to be constructed or altered upon the above-described premises, the Company may furnish plans and specifications therefor and may supervise the construction or alteration in conformity therewith. The Operator shall not undertake any construction, reconstruction or alteration of the building or premises without the written approval of the Company, and no change shall be made in any plan or specification for construction or alteration without the written consent of the Company. Any initial construction shall begin within two months from the date hereof and shall be completed and ready for occupancy (unless prevented by fire, strike, act of God, or other casualty beyond the Operator's control) within six months thereafter. The Operator shall install and use upon the premises only such equipment and furnishings as shall conform to standards of quality and utility approved by the Company.

6. The Operator will conduct business upon the above-described premises in accordance with the aforesaid standards, approved by the Company, and in accordance with the Company's supervisory regulations and instructions. The Operator will repair and paint the exterior and interior of the buildings upon the premises at reasonable time upon the request of the Company, and at all times will mainain the interior and exterior of the buildings and the surrounding premises in a clean, orderly, and sanitary condition satisfactory to the Company. At its own expense, the Operator will prominently display in and upon the land and buildings at the above-escribed premises, "HOWARD JOHNSON'S" advertising signs, of such nature, form, color, number, location, and size and containing such material as the Company shall direct or approve in writing; and the Operator will not display in or upon the said premises or elsewhere any sign or advertising media of any kind to which the Company objects. The Company, or its authorized agents, may at any time enter upon the said premises and remove any objectionable signs or advertising

media, or signs which the Company has loaned to the Operator, and may keep or destroy such signs or other media without paying therefor or without being deemed guilty of trespass or any other tort.

7. The Operator shall deliver to the Company monthly statements of sales and other monies received from the operation of all business at the above-described premises and within thirty (30) days following the end of each succeeding full year of the term of this agreement a statement of yearly gross sales which shall be certified to by the Operator and by a certified public accountant. The Operator shall keep at the premises true and accurate records and accounts which shall show all sales made and all gross receipts from the business upon and within the described premises. Said books and accounts shall be available to the Company and its authorized auditors or agents for inspection at all reasonable times.

8. So long as this agreement shall remain in force and effect, the Operator will not, except with the consent in writing of the Company, engage in any business the same as or similar to the business covered by this agreement at any place other than the premises above-described in the State in which said premises are located or at any place in a State contiguous to said State; the Operator will not employ nor seek to employ any person who is at the time employed by the Company or by any other Operator who is at the time operating a business under the name "HOWARD JOHNSON'S", and will not, directly or indirectly, induce any such person to leave his or her employment as aforesaid.

9. The Operator will place with a duly qualified insurance company and keep in full force and effect during the life of this agreement, public liability insurance in amounts of not less than One Hundred Thousand ($100,000.) Dollars in case of damage or injury to one person, nor less than Three Hundred Thousand ($300,000.) Dollars in case of damage or injury to more than one person, for the benefit of the Company and/or HOWARD D. JOHNSON (as well as for the benefit of the Operator) covering liability of all kinds including claims on account of foreign substances in or spoilage of food or drink and will lodge with the Company the policies or certificates of such insurance.

10. So long as this agreement shall remain in force and effect the Operator will not, without the consent in writing of the Company, mortgage, pledge, or otherwise assign as security the premises above-described or any part thereof, or the equipment or furnishings located and used therein or any interest which the Operator may have in any part thereof.

11. So long as this agreement shall remain in force and effect, the Operator will not sell, transfer, assign, lease or sublet nor offer to sell, transfer, assign, lease or sublet, any interest in the said premises or any part thereof, or in the business thereon conducted, or in the equipment or furnishings located therein, without in each instance first offering the same to the Company, exclusively, at a stated price and on stated terms, which offer the Company may accept at any time within sixty days, and if the Company does not accept such offer, the Operator may within thirty days thereafter, sell, transfer, assign, lease or sublet such interest as the case may be, but not at a lower price nor on more favorable terms than have been offered to the Company, and in no event shall the Operator offer the said premises or any interest therein, or in the business conducted thereon, or in the equipment or furnishings therein, for sale or transfer at public auction, nor at any time shall an offer be made to the public to sell, transfer, assign, lease or sublet, through the medium of advertisement, either in the newspapers or otherwise, without having first obtained in writing the permission of the Company to such advertisement or publication.

If the Operator wishes prior to the termination of this agreement to discontinue business as aforesaid on the premises above-described, for any reason other than the lease, sale, or transfer thereof to another, the Operator must give to the Company sixty days' written notice thereof, accompanied by an offer to sell to the Company the Operator's entire interest in said premises and all property used thereon. If upon such offer the parties are unable to agree as to a purchase price and terms, the fair value of said premises and property shall be determined by three arbitrators, each party selecting one arbitrator and the two arbitrators so chosen selecting the third arbitrator. The decision of a majority of the arbitrators so chosen shall be conclusive, and the arbitrators shall exclude from their decision as to fair value anything for

good-will or going concern value. The Company shall have the right, at any time within thirty days of being advised in writing of the decision of the arbitrators as aforesaid, to purchase the said premises and property at the valuation fixed as aforesaid by the arbitrators.

Upon sale by the Operator of the premises or property aforesaid to the Company or another, in accordance with this section 11, this agreement shall terminate, except in regard to the obligations of the Operator to take action or abstain from taking action after the termination hereof. The Operator shall not sell, lease, transfer, or permit to be used the said premises or property for a business similar to the business of stands or stores then being operated under the name of "HOWARD JOHNSON'S" during a period of two years after the right of the Company to buy under this section 11 shall have expired.

12. If a petition in bankruptcy shall be filed by or against the Operator or if the Operator shall make an assignment for the benefit of creditors or shall default in the performance of any agreement made hereunder, and such default shall not be remedied to the Company's satisfaction upon demand, then, the Company may terminate this Agreement upon notice in writing to the Operator mailed to the above-described premises and upon the mailing of such notice by the Company, this Agreement and all rights of the Operator hereunder shall terminate ipso facto, but such termination shall not affect the obligations of the Operator hereunder to take action or abstain from taking action after the termination hereof. Waiver by the Company of any particular default by the Operator shall not affect or impair the Company's rights in respect of any subsequent default of the same or a different kind; nor shall any delay or omission of the Company to exercise any right arising from any default affect or impair the Company's rights as to such default or any future default. In the event of a termination of this agreement under this section or section 13, the Company shall have the same right to purchase from the Operator and under the same procedure, the premises herein described and all property used thereon as is set forth in section 11 hereof in connection with a notice of discontinuance by the Operator; provided, however, that the Operator shall not sell, lease, transfer, or

permit to be used the said premises or property for a business similar to the business of stands or stores then being operated under the name of "HOWARD JOHNSON'S" during a period of two years after the right of the Company to purchase the same from the Operator (as above-described in section 11) shall have expired.

13. Unless terminated as hereinabove provided, this agreement shall remain in effect for twenty years from the date hereof; and shall thereafter be automatically extended for further periods of twenty years, unless at least thirty days before the expiration of any twenty-year term, notice of intention to finally terminate is given in writing by one party to the other. All notices to the Company, provided for herein, shall be delivered by registered or certified mail.

14. Upon the termination of this agreement for any cause, the Operator will immediately discontinue at the above-described premises the use of all trade names, trademarks, signs, structures, and forms of advertising indicative of "HOWARD JOHNSON'S", or the business or products thereof, and will make or cause to be made such changes in signs, buildings, and structures, including the removal of the tower, cupola and roof and the painting in a different color of other portions of the building, as the Company may direct, effectively to distinguish the same from its former appearance and from other "HOWARD JOHNSON'S" places of business, and if the Operator shall upon request fail or omit to make or cause to be made such changes, then the Company shall have the right to enter upon the premises, without being deemed guilty of trespass or any other tort, and to make or cause to be made such changes at the expense of the Operator, which expense the Operator agrees to pay on demand; and the Operator will not during a period of two years following the date of such termination, directly or indirectly engage in any similar business, without the Company's written permission, within ten miles of any "HOWARD JOHNSON'S" stand or store, or seek to employ any persons who are at the time employed by the Company or by any Operator who is at the time operating a business under the name "HOWARD JOHNSON'S", or directly or indirectly induce any such person to leave his or her employment as aforesaid.

15. The privileges herein granted to the Operator contemplate the operation of a restaurant and/or dairy bar and the rights herein granted shall not be applied or extended, directly or indirectly, to any other business or enterprise without the express consent in writing of the Company. No hotel, inn, tavern, motel or other building shall be erected or operated by the Operator on or adjacent to the described premises without the Company's consent in writing. This Operator's Agreement contains the entire agreement of the parties and no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein shall be of any force or effect. No failure of the Company to exercise any power given it hereunder, or to insist upon strict compliance by the Operator of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of the Company's right to demand exact compliance with the terms hereof. The Company and the Operator are not and shall not be considered as joint adventurers, partners or agent of the other and neither shall have power to bind nor obligate the other except as set forth in this agreement.

16. Should any part of this agreement, for any reason, be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this agreement had been executed with the invalid portion thereof eliminated and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this agreement without including therein any such part, parts, or portion which may, for any reason be hereafter declared invalid.

17. This agreement shall inure to the benefit of the successors and assigns of the Company. The interest of the Operator in this agreement is personal and shall not be assigned, transferred, shared or divided in any manner by the Operator, and if said Operator is a corporation, it is understood and agreed that the shares of Capital Stock of said corporation shall not be sold, pledged, hypothecated, assigned or transferred so as to change the controlling interest therein, without the written consent of the Company.

IN WITNESS WHEREOF the parties have hereunto and to another instrument of like tenor set their hands and seals the day and year first above written.

HOWARD D. JOHNSON COMPANY

By_____
President

/s/ BEN BIBB (SEAL)
Ben Bibb

/s/ P. L. GRISSOM (SEAL)
P. L. Grissom

BELLEVILLE RESTAURANT CO.

By /s/ BEN BIBB (SEAL)
President

HOWARD JOHNSON MOTOR LODGES, INC.
LICENSE AGREEMENT

THIS AGREEMENT Made the 7th day of December, 1959, by and between: HOWARD JOHNSON'S MOTOR LODGES, INC., a Delaware corporation, with a place of business in Quincy, Norfolk County, Massachusetts (herein designated as the "COMPANY") and CHARLES T. GRISSOM, Detroit, Michigan and P.L. GRISSOM & SON, INC. a Michigan corporation jointly, (herein designated as the "LICENSEE") owner, lessee or tenant of the premises described as follows:

Land in the Township of Van Buren, Wayne County, Michigan, described as:

The following described property, except the easterly 682 feet thereof: That part of the northeast ¼ of section 21, town 3 south, range 8 east, Van Buren Township, Wayne County, Michigan, described as follows: Beginning at the north ¼ post of section 21, town 3 south, range 8 east and proceeding thence along the north line of said section, north 89 degrees 15 minutes east 1364.06 feet; thence along the west line of Belle Harbor Estates property, due south 550 feet; thence south 89 degrees 15 minutes west to a point on the north and south ¼ line of said section which point is 550 feet south of the point of beginning; thence due north along the north and south ¼ line of said section coincident with the center line of Quirk Road, due north 550 feet more or less, to the point of beginning except the north 83 feet thereof comprising the Detroit Industrial Expressway and Service Drive and also subject to an easement for highway purposes over that part of subject property lying within Quirk Road.

WITNESSETH:

WHEREAS the Company is the sole owner of the trade name "HOWARD JOHNSON'S MOTOR LODGE" and has acquired the right to use the name "HOWARD JOHNSON'S" in connection with the operation of Motor Lodges, and has formulated and developed a plan, design, method and system for the operation of Motor Lodges, known as the "HOWARD JOHNSON'S MOTOR

LODGE" plan, outlined in the Appendices hereto attached, and has designed certain forms of structures and color combinations in connection therewith; and

WHEREAS the Licensee wishes, upon the terms and conditions hereinbelow set forth, to enter into the business of operating a Motor Lodge under the name of "HOWARD JOHNSON'S MOTOR LODGE," in accordance with standards of construction, operation and services approved by the Company; and the Company is willing to permit the Licensee to use the name "HOWARD JOHNSON'S MOTOR LODGE" for and in said business, at and on the above mentioned premises (without responsibility or liability upon the Company for the operation of said motor lodge), upon the terms and conditions hereinbelow set forth:

NOW, THEREFORE, the parties hereto, in consideration of the mutual agreements herein contained and promises herein expressed, and for other good consideration acknowledged by each of them to be satisfactory and adequate, do hereby agree as follows:

1. The Licensee agrees to within ninety (90) days from the date hereof begin the erection of and to fully complete within a reasonable time thereafter upon the land above described, the building and land improvements in conformity with the plans and specifications agreed upon in writing between the parties hereto which plans and specifications are herein incorporated by reference as fully as though attached hereto. However, there shall be no liability on the part of the Company in any event because of the fact that it has agreed to the plans and specifications, it being understood that said plans and specifications were prepared by the Licensee or his agent. The contract for construction of said building and improvements will be submitted to the Company prior to execution by Licensee and will not be let without the written approval of the Company. Licensee further agrees to commence operation of a "HOWARD JOHNSON MOTOR LODGE" no later than thirty (30) days following completion of the above mentioned building and improvements but no sooner than the same shall have been fully completed (unless Company consents thereto in writing). Licensee shall give the Company thirty (30) days written notice prior to commencing operations. In the event of a

violation of any of the provisions of this paragraph not due to war, governmental restrictions, strikes, lockouts, or acts of God, and after giving Licensee thirty (30) days written notice within which to cure said violation, or in the event Licensee commences construction according to plans and specifications not fully agreed to by the Company, Company may elect in either event to forthwith cancel and terminate this agreement, in which event Company may retain license fee in the amount of Five Thousand Dollars ($5,000.00) this day paid, as liquidated and agreed damages. It is further understood and agreed by and between the parties hereto that in the event the Company so elects to cancel and terminate this agreement, the Licensee shall not purchase, construct nor permit construction of a motor lodge, motel or hotel upon the lands above described by any of his agents or any corporation in which he is a stockholder, without written consent of the Company; nor will the Licensee participate in any profits, dividends, or earnings derived from construction or operation of any such motor lodge, motel, or hotel. This restriction shall remain in full force and effect for a period of five (5) years from the date hereof; or in the event a Howard Johnson restaurant is being operated in the immediate vicinity of the above described lands, said restriction shall remain in full force and effect for so long as said restaurant is in operation.

2. So long and only so long as this Agreement shall remain in force and effect, the Company shall determine and approve standards of construction, operation and service at and on the above described premises, and standards of quality and utility for all furnishings, supplies and equipment used in connection with such business, and the Licensee agrees at all times to conform to said standards. The Licensee shall continuously operate the said business at the above described premises and the Company's supervisory personnel shall have the right to enter upon the premises at any reasonable time for the purpose of examining the same, conferring with the Licensee's employees, inspecting and checking operations, furnishings, supplies, equipment, and determining whether the business is being conducted in accordance with the aforesaid standards and with this Agreement. All such standards shall be substantially the same as outlined in the Appendices attached hereto.

3. So long as this Agreement shall remain in force and effect, the Licensee will diligently promote and make every reasonable effort steadily to increase said business by printed advertisements, highways signs, and in other suitable manner for a reasonable distance from the above referred to location.

4. So long and only so long as this Agreement shall remain in force and in effect, the Licensee may do business on said premises and advertise the above described place of business under the trade name of "HOWARD JOHNSON'S MOTOR LODGE." No designs, advertising, signs, and forms of publicity shall be used upon or in behalf of the above described place of business unless the same shall have been first submitted to and approved in writing by the Company as meeting its standards.

No item of merchandise, equipment, stationery, supplies, furnishings or utensils bearing the trade name "Howard Johnson's" shall be used in, upon, or in behalf of the above described place of business unless the same shall have been first submitted to and approved in writing by the Company as meeting its standards of quality and utility.

5. The License herein granted to use the name "HOWARD JOHNSON'S MOTOR LODGE" is non-exclusive, and the privileges herein granted are applicable only to the above mentioned premises and not elsewhere.

The trade name "HOWARD JOHNSON'S" shall not be used by the Licensee except in conjunction with the words "Motor Lodge".

It is agreed by the Licensee that rights in and to the name "HOWARD JOHNSON'S MOTOR LODGE" and any part thereof or addition thereto and the use thereof shall be and remain the property of the Company, and the Licensee shall assign, transfer and convey to the Company by such instrument in writing as may be requested, all additional rights which may be acquired, if any, by reason of the use of said name by the Licensee.

Any application for registration by the Licensee to use the name "Howard Johnson's Motor Lodge" which may be required by the statutes or laws of any governing body, shall specify that

the Licensee's use of said name is limited to the above described premises and upon termination of this agreement, the Licensee's use of said name shall likewise terminate; by virtue of said registration, no property right in or privilege to use said name is created which will extend beyond termination of this agreement.

Licensee further agrees not to interfere with in any manner nor attempt to prohibit the use or registration of the name "Howard Johnson's Motor Lodge" by any other Licensee of the Company.

6. If any additional building is to be constructed or if substantial alterations are to be made upon the above described premises, plans and specifications therefor shall be submitted to the Company for approval, and the Licensee shall not undertake any such construction or alteration upon the said premises without such approval. The Licensee shall install and use in and upon the premises only such designs, equipment supplies and furnishings as shall conform to standards of quality and utility approved by the Company and shall conduct business upon the above described premises in accordance with the aforesaid standards and in accordance with its supervisory rules, regulations and instructions.

7. The Licensee will repair and paint the exterior and interior of the buildings upon the premises at reasonable times or upon the request of the Company, which request shall not be unreasonably made, and at all times will maintain the interior and exterior of the buildings and the surrounding premises in a clean, orderly and sanitary condition satisfactory to the Company; will prominently display in and upon the land and buildings only such advertising signs, of such nature, form, color, number, location and size, and containing such material as the Company shall approve in writing, and will not display in or upon the said premises any sign or advertising media of any kind to which the Company has reasonable objection. The Company, or its authorized agents, may at any time after five (5) days notice to Licensee, enter upon the said premises and remove any such objectionable signs or advertising media, and may keep or destroy such signs or other media without paying therefor or without being deemed guilty of trespass or any other tort.

8. So long as this Agreement shall remain in force and effect, the Licensee will not, directly or indirectly, except with the consent of the Company (which shall not be unreasonably withheld), engage in business the same as or similar to the business covered by this Agreement at any place other than the premises above described in the State in which said premises are located or at any place in a State contiguous to said State; the Licensee shall not employ or seek to employ any person who is at the time employed by the Company or by any person who is at the time operating a business under the name "HOWARD JOHNSON'S" or "HOWARD JOHNSON'S MOTOR LODGE", and will not, directly, or indirectly, induce any such person to leave his or her employment as aforesaid.

9. It is specifically understood and agreed that the Licensee shall not upon the described premises without the written consent of the Company, directly or indirectly, during the term of this Agreement or any extension thereof, operate or engage or participate in the operation of a restaurant or the preparation or sale of food, and that the Licensee will not, during the term or any extension thereof, without the written consent of the Company, let, use or permit to be used, any part of the above mentioned premises, or any other premises, owned or controlled by him in the vicinity of the above mentioned premises, to be used or occupied as or for a restaurant or for the sale of food; this prohibition, however, shall not apply to the operation of a "HOWARD JOHNSON'S" restaurant under a duly executed franchise agreement with the HOWARD D. JOHNSON COMPANY, of Quincy Massachusetts, or its nominee.

10. Licensee agrees during the term of this Agreement to procure, carry and pay for windstorm, fire and extended coverage insurance, insuring the construction, improvements, and completed buildings upon the demised premises for the full value thereof. The proceeds of any such insurance shall be used to repair or restore the buildings as best as possible to their original condition and evaluation.

Licensee agrees to protect, indemnify and save harmless the Company from and against any and all loss, damage, liability or attorneys' fees and costs incurred by the Company because of:

(1) Any act or neglect of the Licensee or any of its agents, servants, employees, or guests in, on or about the above described premises,

(2) Any other reason so long as such loss, damage, liability or attorneys' fees resulted from the License herein granted, and was not the fault of the Company.

Licensee further agrees to place with an approved insurance company, and keep in effect during the life of this Agreement, insurance for the benefit of the Company and/or Howard D. Johnson (as well as for the benefit of the Licensee), covering public liability of all kinds, in amounts no less than $100,000 in case of damage or injury to one person, nor less than $300,000 in case of damage or injury to more than one person, and property damage insurance of $15,000, and workmen's compensation; will during the term hereof lodge with the Company, certificates of such insurance, and will promptly pay all premiums on said policies as and when the same become due.

11. So long as this agreement shall remain in force and effect, the Licensee will not sell, transfer, assign, lease or sublet, nor offer to sell, transfer, assign, lease or sublet any interest in the said premises or any part thereof, or in the business thereon conducted, or in the equipment, or furnishings located thereon, without the consent of the Company in writing nor without in each instance first offering the same to the Company, exclusively, at a stated price and on stated terms, which offer the Company may accept at any time within sixty (60) days. In the event that the Company does not accept said offer within said sixty (60) days the Licensee may sell, transfer, assign, lease or sublet said interest to another party, subject to the provisions of Article Thirteen of this agreement, for the same price stated and the same identical terms stated in the Licensee's offer to the Company, within thirty (30) days from the expiration of said sixty day period or from receipt of the Company's declination of the offer, whichever is the sooner. In no event shall the Licensee offer the said premises or any interest therein, or in the business conducted thereon, or in the equipment or furnishings thereon, for sale or transfer at public auction, nor at any time shall an offer be made to the public to sell, transfer, assign, lease or sublet, through the medium of adver-

tisement, either in the newspapers or otherwise, without having first obtained in writing the permission of the Company to such advertisement or publication.

12. If the Licensee wishes, prior to the termination of this Agreement, to discontinue operation of a Howard Johnson's motor lodge as herein contemplated on the premises above mentioned, for any reason other than the lease, sale, or transfer thereof to another, the Licensee must give to the Company sixty (60) days written notice thereof, accompanied by an offer to sell to the Company the Licensee's entire interest in said premises and all property used thereon. If, upon such offer, the parties are unable to agree as to a purchase price and terms, the fair value of said premises and property shall be determined by three (3) arbitrators, each party selecting the third arbitrator. The decision of a majority of the arbitrators so chosen shall be conclusive, and the arbitrators shall exclude from their decision as to fair value anything for goodwill or going concern value. The Company shall have the right, at any time within thirty (30) days of being advised in writing of the decision of the arbitrators as aforesaid, to purchase the said premises and property at the valuation fixed as aforesaid by the arbitrators. In the event that the Company does not make a timely exercise of said right to purchase, the Licensee may sell his entire interest in the property for the same price and on the identical terms that were the terms stated in the Company's option within thirty (30) days from the expiration of the Company's option period, subject to the provisions of Article Thirteen of this Agreement.

13. (a) If the Licensee is or shall become the fee owner of the above described premises, the Licensee, for himself, his heirs, administrators, successors and assigns, covenants and agrees that notwithstanding the provisions of Paragraphs 11 and 12, providing for a first refusal to the Company, it is understood and agreed that during the term of this License the premises shall not be sold, assigned, alienated or transferred to anyone other than the Company except upon the express condition that the buyer, assignee or transferee shall, in writing, accept the title thereto subject to all the conditions and covenants hereof for and during the unexpired term hereof, as fully and with the same effect as though said buyer, assignee or transferee were an original party and signatory

hereto. This provision, however, shall be subject to the right of the Company to cancel this License agreement as set forth in sub-paragraph (c) of this Article 13.

(b) If the Licensee occupies the described premises under a lease, sub-lease, or other written contract of tenancy from the owner thereof, the Licensee shall prior to the execution thereof submit such lease, sub-lease or other contract to the Company, and such instrument shall contain the express covenant that throughout the term of said lease the described premises shall at the option of the Company, be used solely and exclusively as and for a Howard Johnson's motor lodge under all of the terms and conditions of this License Agreement and that no assignment, transfer, change, modification or other amendment of such instrument shall be entered into between the Owner and the Licensee without the express consent in writing of the Company. This provision, however, shall be subject to the right of the Company to cancel this License Agreement, as set forth in sub-paragraph (c) of this article 13.

If the Licensee occupies said premises under a lease, sub-lease, or contract of tenancy, with the owner as aforesaid, it is agreed that the Licensee, will cause the "Owner's Consent" attached hereto, to be executed and acknowledged by the owner of said premises within fifteen (15) days after the date hereof, and if such "Owner's Consent" shall not be obtained the Company shall have the option to terminate this License.

(c) It is the intent of the parties hereto that regardless of who occupies the described premises, either as owner, Lessee or otherwise, the described premises shall be operated as a Howard Johnson's Motor Lodge for a period concurrent with the term of this Agreement, but nothing herein contained shall obligate the Company to recognize any successors to the Licensee unless such prospective successor is acceptable in every respect to the Company; and the Company shall have the option and right to cancel this agreement within sixty (60) days after receipt of notice of the closing of a sale, sub-lease or other change of interest in the demised premises, which notice must be given in writing within

sixty days prior to such closing, and shall contain the names and addresses of every person acquiring any interest in the demised premises.

Provided however, nothing contained in this article, or elsewhere in this agreement shall effect the Company's rights to terminate and cancel this agreement as provided in articles 15 and 23 thereof; in the event of termination or cancellation, as provided in articles 15 and 23, no owner of the fee to the herein described premises, nor lessee of such premises, nor other person having any interest therein, shall operate thereon a motor lodge, motel or hotel without written consent of the Company. This restriction shall remain in full force and effect for a period of five (5) years after such termination or cancellation, or in the event a Howard Johnson Restaurant is being operated in the immediate vicinity of the herein described premises this restriction shall remain in full force and effect for so long as said restaurant is in operation.

14. Upon sale or transfer by the Licensee of the premises or property aforesaid to the Company or another, the rights and obligations hereunder of said Licensee shall terminate, except in regard to the obligations of the Licensee to take action or abstain from taking action after the termination hereof in accordance with this Agreement.

15. If the Licensee shall be adjudicated a bankrupt, or shall make an assignment for the benefit of creditors, or if a Receiver shall be appointed to take charge of Licensee's affairs, or if Licensee shall default in the performance of any covenant or Agreement made hereunder, as to standards of operation, payment of amounts due hereunder or otherwise and such defaults shall not be remedied to the Company's satisfaction within fifteen (15) days after notice of such default then the Company may thereupon terminate this Agreement and all rights hereunder of the Licensee, but such termination shall not affect the obligations hereunder of the Licensee, to take action or abstain from taking action after the termination hereof in accordance with this Agreement.

16. Waiver by the Company of any particular default by the Licensee shall not affect or impair the Company's rights in respect

to any subsequent default of the same or a different kind; nor shall any delay or omission of the Company to exercise any right arising from any default affect or impair the Company's rights as to the same or any future default.

17. Upon the termination of this Agreement for any cause, the Licensee will immediately discontinue all use of trade names, trademarks, signs and forms of advertising and other indicia of operation as a "HOWARD JOHNSON'S MOTOR LODGE", and will discontinue use of blue-green and orange colors, and remove the cupola and all orange tile roofs from the buildings or other structures on the described premises, as the Company may direct, effectively to distinguish the same from its former appearance as a designation of a "HOWARD JOHNSON'S MOTOR LODGE", and if the Licensee shall fail or omit to make or cause to be made such changes within fifteen (15) days after written notice, then the Company shall have the right to enter upon the premises, without being deemed guilty of trespass or any other tort, and to make or cause to be made such changes at the expense of the Licensee, which expense the Licensee agrees to pay on demand.

18. Unless terminated as hereinabove provided, this Agreement shall remain in effect for twenty (20) years after the date the first minimum royalty fee payment is due as provided in Paragraph 19 hereof; and shall thereafter be automatically extended from year to year, unless at least ninety (90) days before the expiration of the term or any extension thereof, notice of intention to finally terminate is given in writing by one party to the other.

19. In consideration of the issuance of this license, the Licensee agrees to pay to the Company the following:

(a) A LICENSE FEE of Five Thousand Dollars ($5,000.00)

(b) A MINIMUM MONTHLY ROYALTY FEE of Six Hundred and Twelve ($612.00) Dollars being the fee payable for not more than 72 rooms.

(c) An ADDITIONAL ROYALTY FEE of that amount by which five per cent (5%) of the Licensee's gross receipts derived from the renting of guest rooms in said Motor Lodge

or derived from any other business operated upon the described premises exceeds the minimum royalty fee provided for in sub-paragraph (b) above.

Said License Fee and Royalties shall be payable as follows:

(aa) A LICENSE FEE of Five Thousand Dollars ($5,000.00)

(bb) The MINIMUM ROYALTY FEE shall be payable monthly, in advance, beginning on the tenth (10th) day of the calendar month following completion of the building, and continuing thereafter on the tenth (10th) day of each and every month during the term or any extension hereof.

(cc) The ADDITIONAL ROYALTY FEE, if any, shall be payable within ten (10) days after the end of each and every month during the term or any extension hereof, with an annual adjustment in the event the total additional royalty fee paid for such year exceeds five per cent (5%) of the Licensee's annual gross receipts.

20. The Licensee agrees to submit to the Company monthly statements showing the number of rooms rented and the gross receipts at the end of the first month after completion of the building and each succeeding month thereafter during the term hereof. All such statements shall be signed by the Licensee, certifying as to the amount of the gross receipts for the month accounted for.

The Licensee shall, with respect to business done by it at said Motor Lodge, keep on the premises true and accurate records, accounts, books and data, which shall accurately reflect all particulars relating to the number of rooms rented and the gross receipts of said business operated upon the described property. The Company, its agents or representatives may examine and audit said records, accounts and books at all reasonable times.

The term "Gross Receipts" shall include gross amounts received by the Licensee as payment for the use or occupancy of all guest rooms in said Motor Lodge, and gross amounts derived from any other business operated upon the described premises, excluding sales or other tax receipts which may be required by law to be collected from guests and excluding receipts from telephones, telegraph, magazines, and cigarette and soft drink vending machines.

21. The Licensee shall not allow the described premises or any part thereof to be used for any immoral or illegal purpose, and shall not allow, suffer or permit the same to be used for any purpose, business, activity, use, function or object to which the Company has reasonable objection.

22. This instrument contains the entire Agreement of the parties, and no representation, inducements, promises or agreements, oral or otherwise, not embodied herein, shall be of any force or effect. No failure of the Company to exercise any power given it hereunder, or to insist upon strict compliance by the Licensee of any obligation hereunder, and no custom or practice at variance with the terms hereof shall constitute a waiver of the Company's right to demand exact compliance with the terms hereof.

The Company and the Licensee are not and shall not be considered as joint venturers, partners or agents of each other, and neither shall have power to bind or obligate the other except as set forth in this Agreement.

23. In the event Licensee or any successor of the Licensee herein is a corporation, it agrees as follows:

(a) It will furnish the Company at the time of execution of this License Agreement a Stockholders Agreement executed by all of the stockholders of the Licensee corporation stating that no such stockholder will sell, assign or transfer any of his stock to any person or company other than his immediate family or persons who are stockholders of the Licensee corporation at the time of execution of this License Agreement, without written consent of the Company.

(b) It will furnish the Company at the time of execution of this Agreement a Resolution of the Board of Directors which has been ratified by the stockholders of the Licensee corporation stating that no unissued stock in said Licensee corporation will be issued to any person or company other than the stockholders of said Licensee corporation at the time of execution of this Agreement, without the written consent of the Company.

(c) In the event of a violation of the provisions of sub-paragraphs (a) and/or (b) above, the Company shall have the option and right, after giving Licensee thirty (30) days written notice in which to cure said violation, to forthwith cancel and terminate this License Agreement, and thereupon the rights and obligations hereunder shall cease, but such termination shall not affect the obligations hereunder of the Licensee to take action or abstain from taking action after the termination hereof as provided elsewhere in this agreement.

24. This agreement shall be governed by and construed in accordance with the laws of, or applicable to, the State of Massachusetts.

25. All terms and words used in this agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context or sense of this agreement or any paragraph or clause herein may require, the same as if such words had been fully and properly written in the number and gender.

26. The agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, but such counterparts together shall constitute but one and the same instrument.

27. Should any part of this Agreement, for any reason, be declared invalid, such decision shall not affect the validity of any remaining portion, which remaining portion shall remain in force and effect as if this Agreement had been executed with the invalid portion thereof eliminated, and it is hereby declared the intention of the parties hereto that they would have executed the remaining portion of this Agreement without including therein any such part, parts or portion which may, for any reason, be hereafter declared invalid.

28. All notices to the Company shall be sent by registered or certified mail addressed to the Company at its office at 89 Beale Street, Wollaston 70, Massachusetts, or at such other address as the Company shall designate in writing.

All notices to the Licensee shall be sent by registered or certified mail addressed to the Licensee at 6049 West Fort Street, Detroit, Michigan or at such other address as the Licensee shall designate in writing.

29. All rights under this Agreement shall inure to the benefit of the successors and assigns of the Company. Any individual Licensee herein agrees that his interest in this Agreement is non-transferable and shall not be sold, pledged, hypothecated, assigned or transferred without the express consent in writing of the Company. Any corporate Licensee agrees that its interest herein is non-transferable and shall not be sold, pledged, hypothecated, assigned or transferred, nor shall the controlling interest in said corporation be changed, without the express consent in writing of the Company.

IN WITNESS WHEREOF the parties have hereunto and to another instrument of like tenor set their hands and seals the day and year first above written.

WITNESSES:

/s/ JOSEPH V. CRONIN

/s/ MARGERY J. LOGAN
As to "Company"

HOWARD JOHNSON'S
MOTOR LODGES, INC.

By: /s/ HOWARD B. JOHNSON
President

ATTEST:

/s/ EUGENE J. DURGISS
Secretary
"COMPANY"

WITNESSES:

_____

_____
As to "Licensee"

/s/ CHARLES T. GRISSOM
Charles T. Grissom

P. L. GRISSOM & SON, INC.

By: /s/ P. L. GRISSOM

July 9, 1972

NOTICE TO EMPLOYEES

Notice is hereby given that as of midnight, July 23, 1972, your employment with Belleville Restaurant Company, a Michigan corporation, shall be terminated unless the last day you are scheduled to work is prior to midnight, July 23, 1972, which date will be the termination date of your employment.

All vacation accrued up to midnight, July 23, 1972 as well as pay earned as of said date will be paid on July 24, 1972.

* * *

July 9, 1972

NOTICE TO EMPLOYEES:

Notice is hereby given that as of midnight, July 23, 1972, your employment with Howard Johnson Motor Lodge, Inc., a Michigan corporation, shall be terminated unless the last day you are scheduled to work is prior to midnight, July 23, 1972, which date will be the termination date of your employment.

All vacation accrued up to midnight, July 23, 1972 as well as pay earned as of said date will be paid on July 24, 1972.

* * *

June 28, 1972

Fred Colombo, Esquire
1500 North Woodward
Suite 209
Birmingham, Michigan 48011

Re: Howard Johnson Restaurant
45915 Willow Run
Expressway
Belleville, Michigan

and

Howard Johnson Motor Lodge
45915 Willow Run
Expressway
Belleville, Michigan

Dear Mr. Colombo:

This will confirm our telephone conversation on Monday, June 27, 1972. It was understood and agreed that the Purchaser, HOWARD JOHNSON COMPANY, would not recognize and assume any labor agreements between the Sellers, CHARLES T. GRISSOM and P.L. GRISSOM & SON, INC. and BELLEVILLE RESTAURANT COMPANY, and any labor organizations. It is further understood and agreed that the Purchaser does not assume any obligations or liabilities of the Sellers resulting from any labor agreements or unfair labor practices.

Please acknowledge the agreements and understandings set forth above by signing in the space provided below. I have enclosed an original and five copies. Please execute and return the original and two copies.

Very truly yours,

HOWARD JOHNSON COMPANY

/s/ V. E. BURKS
V.E. Burks, Vice President
Industrial Relations

For and on behalf of the Sellers:
CHARLES T. GRISSOM AND P.L. GRISSOM & SON, INC. and
BELLEVILLE RESTAURANT COMPANY

By: /s/ CHARLES T. GRISSOM
/s/ P. L. GRISSOM
Date: July 11, 1972

DATED: July 11, 1972

AGREEMENT

Effective Date August 1, 1968. Renewal Date August 1, 1971

AGREEMENT made this 1st day of August, 1968, by and between HOWARD JOHNSON MOTOR LODGE, INC. BELLEVILLE, hereinafter referred to as the "Employer" and the hotel, Motel & Restaurant Employes Union Local 705, hereinafter referred to as the "Union".

WITNESSETH

In consideration of the premises and the mutual covenants and premises of the parties hereto, IT IS HEREBY AGREED as follows:

ARTICLE I

RECOGNITION–UNION MEMBERSHIP–EMPLOYE HIRING–CHECK-OFF

Section 1. – Recognition. The Employer hereby agrees to recognize the respective Union as the sole and exclusive bargaining representative for the purpose of collective bargaining with respect to rates of pay, hours of work and other conditions of employment for employes coming within the jurisdiction of the Union covered by Schedule "A" attached hereto, and made a part of this Agreement. If the bargaining agent for Hotel, Motel, Restaurant, Office and Checkroom Employees Union, Local 880, can prove at any time during the term of this Agreement that it represents a majority of the employes listed in Schedule "D" (Detroit Hotel Association Contract), Local 880 will be recognized as the bargaining agent for such employes and thereupon such employes will be automatically covered by this Agreement. Supervisory and confidential employes are defined in the Labor Management Relations Act of 1947, as amended, are excluded from this Agreement.

Section 2. – Union Membership. The Employer agrees that it is a condition of employment that all employes of the Employer covered by this Agreement who are members of the Union in good standing on the date of the execution hereof shall remain members in good standing and that all employes of the Employer covered by this Agreement who are not members of the Union on the date

of the execution hereof shall, on the 31st day following the effective date of the Agreement, become and remain members in good standing of the Union.

It is also agreed that it shall be a condition of employment that all new employes covered by this Agreement shall become and remain members in good standing of their Union on the 31st day following the date of their employment.

The Employer agrees, when requested by the Union, to discharge any employe who fails to render his membership dues, including an initiation or reinstatement fee and monthly dues, in accordance with the foregoing Section.

Section 3. – Employe Hiring. In order to facilitate the employment of necessary help, to assure qualified employes of an efficient system of locating employment and insure the Employer a regular source of available employes, the Union agrees to operate a job referral system in a non-discriminatory manner for employes within their jurisdiction. All persons who are referred to the Employer by their respective Union shall be identified by job referral slips and delivered to the Employer by the individual being referred except as hereinafter provided.

It is understood and agreed by the Union that the operation of said job referral system shall be on a non-discriminatory basis and in accordance with the following terms, conditions and standards:

(a) It is agreed that the Employer shall have the right to reject any job applicant referred by the Union. In the event any applicant is rejected, the Employer shall request that additional applicants be furnished by the Union from their job referral system.

(b) In the event a job referral system fails to supply qualified workers to the Employer within forty-eight (48) hours after a request is made, the Employer may engage new employes from any other source except from fee charging employment agencies. The Employer shall notify the Union of the name, address, social security number and date of employment of such new employes within five (5) days after date of hiring.

(c) The Employer agrees to hire all extra employes in the manner above provided using the job referral system operated by the Union.

(d) The Union shall establish and maintain appropriate registrations for qualified applicants available for employment in the established job classifications, and the conduct of this activity by the Union shall be in accordance with the application of the above terms, conditions and provisions.

(e) The Union agrees to permit newly hired non-Union employes to become members of the Union upon making application for membership and the payment of the customary initiation fees and regular dues.

(f) Employes will be hired without discrimination as to race, creed, color, national origin or sex (excluding occupations where service requirements require the use of one (1) sex). The application of non-discriminatory policy shall apply to, an addition to hiring, upgrading, demotion or transfer, recruitment, rates of pay and selection for training.

(g) The provision relating to the above mentioned job hiring and referral systems shall be posted in places where notices are customarily posted for the information of employes.

Section 4. – Check-Off. The Employer agrees to deduct membership dues, including initiation and reinstatement fees and monthly dues, in such sums as may be established from time-to-time by the Union in accordance with their constitution and by-laws, from the pay of each employe, provided no such sums shall be deducted by the Employer from any employe's wages unless and until the employe has voluntarily signed an authorization card authorizing the deduction of the same, such authorization and assignment not to be irrevocable for a period longer than one (1) year or the termination of this Agreement, whichever first occurs, at which time it may be revoked by written notice given by the employe to the E..ployer and the Union at any time during a period of ten (10) days prior to the expiration of each period of one

(1) year or the expiration of this Agreement, whichever first occurs.

If no such notice is given, the authorization shall be automatically renewed for successive periods of one (1) year thereafter with the same privilege of revocation at the end of each such period. All sums to be deducted from the wages of any employe, pursuant to the authorization card, shall be deducted from the first paycheck each month of the employes. The Employer shall, on or before the seventh (7th) day of each month, forward a check to the Union office to cover the total amount of dues checked off, together with a statement (on forms to be supplied by the Union) setting forth the names, addresses, job classification, and social security numbers of the employes.

ARTICLE II
UNION RIGHTS

Section 1. Authorized representatives of the Union shall be permitted to visit the premises of the Employer at all reasonable hours for the purpose of transacting Union business. Representatives of the Union shall not interfere with the operations of the Employer while transacting such Union business.

Section 2. Regular shop or department stewards shall be allowed reasonable time off from work, without loss of pay, in handling and adjusting grievances on the premises of the Employer which arise in their own departments.

Section 3. Union officers and stewards shall be allowed to attend Union meetings, without pay, called upon proper notice to the Employer. The payroll and hiring records of an Employer shall be made available upon demand to representatives of the Union in connection with the enforcement and carrying out of the terms and provisions of this Agreement when the purpose of the demand is stated in writing.

Section 4. Duly elected delegates to Union conventions or assemblies shall be excused from work, without pay, for the purpose of attending such convention or assembly without any loss of right or privileges upon proper notification to the Employer. Time off for local conventions shall not exceed seven (7) calendar days

and time off for international conventions shall not exceed fifteen (15) calendar days.

ARTICLE III

WORK WEEK – HOURS OF WORK – DESIGNATION OF 6th AND 7th DAYS – REPORTING FOR WORK – DEFINITIONS OF STEADY EMPLOYES AND EXTRA EMPLOYES

Section 1. Supervisory or excluded employes as defined in the Labor Management Relations Act of 1947, as amended, shall not perform the work of employes in the respective bargaining units except during relief periods, absenteeism, sickness, rush periods and in cases of emergency.

Section 2. Eight (8) hours of work shall constitute a work day and five (5) days of work in the established payroll week of an Employer shall constitute a work week.

Section 3. Time and one-half shall be paid for all hours worked in excess of eight (8) hours in any one (1) day and for all hours worked in excess of forty-eight (48) hours in an Employer's work week. There shall be no pyramiding of overtime, and overtime hours paid on a daily basis shall not be included in paying overtime on a weekly basis.

Section 4. It is agreed and understood that those employes who desire a permanent five (5) day work schedule will not be required to work a six (6) day forty-eight (48) hour schedule.

Section 5. An Employer shall designate one (1) day in its payroll week as the designated sixth (6th) day and one (1) day as the designated seventh (7th) day of each steady employe. An Employer shall have the right to designate any day in its payroll week as the designated sixth (6th) day and any day as the designated seventh (7th) day of each steady employe. An Employer shall not be required to designate two (2) consecutive days as the designated sixth (6th) day and as the designated seventh (7th) day of any steady employe. An Employer shall not change the work schedules of employes, except as permitted in Section 7 following, so circumvent the payment of overtime. When a change is made which has this effect, overtime shall be paid. This Section shall not apply to or cover extra employes.

Section 6. An employe who works seven (7) consecutive days shall be paid double his regular straight time hourly rate of pay provided he has worked his regular schedule of straight time hours before working the seventh (7th) consecutive day of work. If an employe is voluntarily absent from work during his regular schedule of straight time hours for personal reasons or any reason except on account of illness, approved leave of absence or vacation, or with the permission of the Employer, the employe must make up such lost time at his straight time hourly rate of pay before receiving premium pay for the seventh (7th) consecutive day of work.

Section 7. An Employer shall have the right, once every thirty (30) days upon giving seven (7) days' notice, to change the designation of the designated sixth (6th) day of an employe and designate any other day in its payroll week as the designated sixth (6th) day of an employe. An Employer shall have the right, once every sixty (60) days upon giving seven (7) days' notice, to change the designation of the designated seventh (7th) day of an employe and designate any other day in its payroll week as the designated seventh (7th) day of an employe.

Section 8. Steady employes may be requested but shall not be required to work their designated sixth (6th) or seventh (7th) days of work unless willing to work. This section shall not apply to or cover extra employes.

Section 9. Steady employes properly reporting for work on any day shall be paid in full for that day even though the Employer sends such employe home due to shortage of work. Extra employes properly reporting for work shall be paid even though the employer sends them home because of shortage of work. This provision shall not apply in any case of extreme, emergency, extreme emergency being defined as fire, tornado, flood, hurricane, riot, civil commotion or Acts of God. Employes shall, however, when reporting during any such emergency, be paid for all hours actually worked and in no case less than one-half of their regular rate of pay for said day.

Section 10. An Employer shall not make a daily practice of requiring employes to work overtime. In general, overtime will be

required only whenever necessary or in cases of emergency. Overtime shall be paid for only when authorized by the employe's supervisor.

Section 11. Whenever reasonably possible, an Employer shall endeavor to fix his work schedules so as to afford a choice of days off and hours worked to employes in the same job classifications on a seniority basis.

Section 12. When overtime is required within a specific job classification in a department it shall be rotated, whenever reasonably possible, among the employes in each specific job classification so that the overtime, so far as reasonably possible, may be shared among such employes.

Section 13. A regular employe is defined as any employe working four (4) days or more per week. An extra employe is defined as any employe working three (3) days or less per week.

ARTICLE IV
WAGE RATES AND SPECIFIC WORKING CONDITIONS

Section 1. Reference is made to Exhibit A attached hereto and made a part of this Agreement covering adjustments to be based upon increases to the cost-of-living index during 1967, as set-forth and provided in said Exhibit.

Section 2. The wage rates set-forth in Schedule "A" attached and made a part of this Agreement shall remain in effect in accordance with said schedule until the expiration of this Agreement as hereinafter set-forth. The non-listing of a job classification in Schedule "A" shall not preclude the Union from representing any employes properly coming within the jurisdiction of the respective Union.

Section 3. The wage rates set-forth in the attached Schedule "A" shall be regarded as minimum wage rates and this Agreement shall not interfere with the right of employes to receive higher wages for superior knowledge and ability.

Any individual employe now receiving a wage higher than the stipulated contract minimum rate for his job classification shall

have such contract differential maintained during the life of this Agreement as long as he occupies the same job classification.

Section 4. Wages of steady employes shall be paid weekly. Extra employes shall be paid immediately after their work has been performed.

Section 5. The listing of the job classifications in Schedule "A" shall not be designated the same as the employes, such job classifications, but when employes are hired by the Motel in any of said job classification, such employes shall be paid at the rate fixed for their specific job classifications.

Section 6. No provision of this Agreement shall be used to deprive any employe presently employed by an Employer of any benefits or privileges authorized by the Employer which such employe enjoys upon the date of the execution of this Agreement or to reduce the wage rate of any employe presently employed by the Employer on the execution of this Agreement if the wage rate paid to the employe is higher than the contract minimum wage rate for his job classification, provided, however, that if any new employes are employed by the Employer hereafter the Employer shall have the right to employ then in accordance with the job classification rates set-forth in the attached Schedule.

Section 7. No provision of this Agreement shall be used to deprive any employe of any benefit or privildge which is granted by the Employer during the term of this Agreement that exceeds the terms and provisions of this Agreement provided that such benefit or privilege is granted by the Employer to the employe in writing. If any benefit or privilege is granted by the Employer to an employe in writing during the term of this Agreement, a copy of the same shall be mailed to the Union. No benefit or privilege granted by the Employer during the term of this Agreement which exceeds the terms and provisions of this Agreement shall be effective unless granted by the Employer in writing.

ARTICLE V
VACATIONS

Section 1. Employes, upon completion of continuous employment as set-forth below with the Employer shall receive vacations with pay as follows:

(a) Employes who have completed one (1) year of continuous service but less than two (2) years of service with the Employer–

One (1) Week's Vacation

(b) Employes who have completed two (2) years of continuous service but less than twenty (20) years of service with the Employer–

Two (2) Weeks' Vacation

(c) Employes who have completed twenty (20) years of continuous service with the Employer–

Three (3) Weeks' Vacation

Vacation pay shall be computed on the basis of forty (40) hours at the employe's straight time hourly rate for each week of vacation to which the employe is entitled. Employes who are on the steady payroll, punch time clocks and receive their wages direct from the Motel shall be considered as steady employes for the purpose of vacation payments.

Section 2. Steady employes having continuous employment in accordance with the provisions of Section 1 above, but working less than five (5) days of eight (8) hours each per week shall be paid on a pro rata based upon the number of hours worked each week, with full cash payment thereof to be made in advance.

Section 3. If a steady employe is laid off or discharged by the Employer, except for reasons specified in Section 5 below, he shall receive his earned vacation pay computed on a pro rata basis of one-twelfth (1/12th) of his earned vacation for each month worked, or major fraction thereof, since the last anniversary vacation date of the employe.

Section 4. If an employe quits after having worked three (3) months or more of his current vacation year, he shall receive his earned vacation pay provided two (2) weeks' notice is given by the employe to the Employer of his intention to quit, the earned vacation to be computed on a pro rate basis of one-twelfth (1/12th) for each month worked or major fraction thereof since the last anniversary vacation date of the employe.

Section 5. If an employe quits without giving notice as provided in the preceding Section or is discharged for violation of posted reasonable house rules, proven dishonestly or drunkenness, such employe shall not be entitled to the payment of any vacation benefits.

Section 6. The vacation period of employes shall be scheduled by the Employer in accordance with his requirements. The choice of time off during such vacation periods shall be selected on a seniority basis whenever possible. If the scheduled vacation period of an employe is cancelled by the Employer and no other vacation time is available, the employe shall receive cash pay in lieu of such vacation.

Section 7. In the event the Employer sells its Motel, or by any other means ceases to operate such establishment, the Employer shall pay each of its employes whose periods of employment shall have or will entitle them to a vacation the cash equivalent of any vacation which said employes shall have earned to the date of the cessation of operations. In the event of the sale of the Motel, this clause may be waived if the new owner or operator agrees in writing, and the Union is supplied with a copy of such written agreement to schedule and pay vacations on the basis of employment with the former Employer bridged to his own period of operations.

Section 8. Schedules for vacations are to be posted in advance so that seniority employes can have their choice of days off.

ARTICLE VI
HOLIDAYS

Section 1. In 1968 steady employes shall be paid their straight time hourly rate for the following holidays if not worked and double their straight time hourly rate if said holidays are worked, to-wit: Memorial Day and Thanksgiving Day, Christmas Day & New Year's Day.

Section 2. In 1969 steady employes shall be paid their straight time hourly rate for the following holidays if not worked and double their straight time hourly rate if said holidays are

worked, to-wit: Memorial Day, Thanksgiving Day, Christmas Day and New Year's Day.

Section 3. In 1970 & 1971 steady employes shall be paid their straight time hourly rate for the following holidays if not worked and double their straight time hourly rate if said holidays are worked; to-wit: Memorial Day, Thanksgiving Day, Christmas Day and New Year's Day.

Section 4. If an employe works one (1) of the above designated paid holidays and it falls either on his designated sixth (6th) or his designated (7th) day, the employe shall receive premium pay as follows: On the employe's designated sixth (6th) day – two and one-half (2½) times his straight time hourly rate shall be paid; on the employe's designated seventh (7th) day – three (3) times his regular straight hourly rate shall be paid.

Section 5. In order to become eligible for holiday pay in accordance with the foregoing sections, an employe must work his last scheduled workday preceding and his first scheduled workday following said holidays unless excused by the Employer on account of sickness, physical disability or other reason or unless the employe is on approved vacation, or unless the day before or the day after a holiday is a regular scheduled day off for the employe.

Section 6. An employe shall not be eligible for holiday pay for a holiday not worked until he has been in the employ of the Employer for more than thirty (30) days.

Section 7. An employe on personal leave of absence or an employe who has been on sick leave for more than five (5) days shall not be entitled to holiday pay.

Section 8. An employe who has been laid off because of lack of work shall be paid for a designated holiday if said holiday occurs within five (5) working days of his layoff.

Section 9. If one (1) of the aforesaid holidays fall during a period when an employe is on approved vacation, said employe shall receive an extra day's pay.

Section 10. If an employe fails to show up for work on a holiday that he is scheduled to work, such employe shall forfeit all

pay for that holiday unless such employe is excused by the Employer on account of sickness or physical disability.

Section 11. The provisions of Article VI shall not apply to or cover extra employes.

ARTICLE VII
HEALTH – WEALTH – PENSION PROGRAM

Section 1. The Employer shall contribute to the Hotel and Restaurant Employees Insurance Fund the sum of forty-five (45c) Cents per day from the first day of employment for each day worked, with a minimum of two Dollars ($2.25) twenty-five Cents per week for each week worked by steady employes. The Employer shall contribute to the Hotel and Restaurant Insurance Fund the sum of forty-five (45c) Cents per day for each day worked by all other employes covered by this Agreement. Such contributions shall be used for insurance coverage to provide benefits for employes eligible for benefits.

Section 2. The Employer shall contribute, in addition to the contributions provided for the preceding Section, the sum of Forty (40c) Cents per day for each day worked for employe covered by this Agreement to the Hotel and Restaurant Employes Pension for the purpose of establishing and paying pensions to eligible employes as provided in an Trust establishing the Hotel & Restaurant Employes Benefit Plan.

Section 3. Contributions as provided in the foregoing Sections are payable for any period while an employe is on a paid vacation or for a paid holiday.

Section 4. Contributions are due on the Tenth (10th) of the month following the month for which they are due. Failure on the part of an Employer to make contribution as provided for herein shall render the Employer liable for claims to the full extent of all allowable benefits and for all contributions due hereunder.

ARTICLE VIII
SENIORITY

Section 1. The Employer agrees to recognize seniority in specific job classifications within each department and that em-

ployes in specific job classifications within each department shall, whenever reasonably possible, be promoted, demoted, laid off and recalled to work according to their length of service, provided, however, that the employe qualifies for the specific job classification within the department, and provided further, that if any operation within a department uses male or female employes exclusively, employes of the opposite sex in any other operation within the same department shall not have any seniority rights in the other operation within that same department.

Section 2. New employes shall be considered probationary employes and shall not acquire any seniority rights until they have been employed for a continuous period of thirty days or more within a period of ninety (90) days.

Section 3. Seniority rights shall terminate if an employe –

(a) Quits or retires;

(b) Is discharged for cause;

(c) Is absent for three (3) consecutive days without notice to the Employer, except in any event where an employe is unable to give such notice to the Employer due to circumstances beyond his control. In such event the employe shall give notice to the Employer as soon as possible but in no event, in not less than ten (10) days, otherwise his seniority shall terminate.

(d) Is laid off for a period equal to his seniority or one (1) year, whichever is the lesser period of time.

Section 4. Approved sick leaves not exceeding one (1) year and maternity leaves of absence not exceeding one-hundred (180) and eighty days shall be considered as time worked in the computation of seniority, provided, however, that vacation benefits shall not accrue after the first four (4) months of any such sick leaves.

Section 5. No extra employes in job classifications shall be used where seniority employes within the same job classifications are on layoff except in cases of emergency, or where the Employer cannot contact laid off employes in the same job of classification. This provision shall not apply to Hotels having twenty-five (25%)

percent or more permanent guests, which Hotels shall be listed on Schedule "E" attached hereto.

Section 6. An employe transferred or promoted to a new job classification or a supervisory position shall retain his seniority as of the date of promotion. An employe transferred to a new job classification shall accumulate seniority in such classification as of the date of his transfer. An employe transferred to a supervisory position shall continue to accumulate seniority while occupying a supervisory position outside the bargaining unit provided such employe maintains his membership in the bargaining unit. If an employe is re-transferred to his former job classification in the bargaining unit, he shall retain full seniority rights as of the date of his re-transfer. If an employe occupies a supervisory position outside the bargaining unit for a period of two (2) years or longer, he shall lose all seniority rights.

ARTICLE IX

GRIEVANCES – ARBITRATION

Section 1. If an employe has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set-forth:

Step 1. The aggrieved employe or the Union shall take the grievance up with his department head.

Step 2. If the grievance is not settled under Step 1, the aggrieved employe shall take the grievance up with the local Union who shall attempt to adjust the matter with Management.

Step 3. If the grievance cannot be settled by Step 2, it shall be presented by the Union to the Employer who shall make a decision in two (2) weeks. If the decision of the Employer is unacceptable either to the Union or to the Employer, either party shall have the right to demand arbitration in accordance with the following step.

Step 4. The arbitrator shall be selected from a list furnished by the American Arbitration Association within two (2) weeks after such list is furnished to the parties. Upon

the appointment of an arbitrator selected from a list furnished by the American Arbitration Association, the subject matter of the grievance shall be submitted to the arbitrator within five (5) days after the selection of the arbitrator unless the parties mutually agree upon a longer period of time. Evidence shall be submitted by both parties within ten (10) days thereafter. The decision of the arbitrator shall be final and conclusive upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties. Failure of the parties to agree upon an arbitrator within the period of time set-forth above shall give the employe the right to strike to solve unsettled grievances.

Section 2. An arbitrator shall not have any right or authority to add to, subtract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be the subject matter of any grievance or arbitration procedure.

ARTICLE X
LEAVES OF ABSENCE

Section 1. Leaves of absence without pay for reasonable periods of time, not to exceed four (4) months, shall be granted by an Employer to employes for reasons of bona fide illness. Such leaves of absence for bona fide illness shall not effect employes' vacation or seniority rights.

Section 2. Leaves of absence without pay not to exceed two (2) months may be granted by mutual agreement between the Employer and the employe for other reasons but under such conditions the Employer shall determine the extent, if any, to which vacation rights shall be affected.

Section 3. Any leave of absence that may be granted may be extended, with the approval of the Employer, beyond the time allowed therefor as set-forth above.

Section 4. An employe who has a vacation accrued at the time of being granted an approved leave of absence or who is absent because of illness may elect to include such accrued vacation in his time off.

Section 5. All leaves of absence and extension of leave of absence must be in writing signed by the Employer and a copy sent to the Union.

ARTICLE XI
RIGHTS OF EMPLOYER – RIGHTS OF EMPLOYES

Section 1. An Employer shall have the exclusive right to control and direct its employes. This right shall include, among other things, the right to hire, promote, lay off, transfer, discipline, discharge, refuse to hire, set work schedules, make work assignments and direct and control its operations provided any decision of the Employer which is contrary or in violation of the provisions of this Agreement shall be subject of the grievance procedure.

Section 2. The Employer agrees not to discriminate against or discharge any Union member because of his or her proper Union activity.

Section 3. If a steady employe is laid off for a period of five (5) or more working days, except in cases of drunkenness, proven dishonesty, excessive absenteeism or violation of posted reasonable house rules, the Employer shall notify the employe affected at least three (3) days prior to the effective date of the layoff, but in the absence of such notice, the Employer shall pay the affected employe three (3) days' pay.

Section 4. If a steady employe is discharged, except for violation of posted reasonable house rules, drunkenness or proven dishonesty, the Employer shall notify the employe of his discharge at least three (3) days prior to the effective date thereof, but in the absence of such notice the Employer shall pay the affected employe three (3) days' pay.

Section 5. The Employer shall post in a conspicious place in the employes service area, a schedule indicating the days off of

employes, the starting and quitting times and the vacation period allowable.

ARTICLE XII
QUESTIONNAIRE CHANGE

Section 1. In the event an Employer turns over to any person or persons, the operation of any department of its Motel, the Employee shall notify the tenant of the terms and provisions of the Agreement before the execution of any lease. In addition, the Employer shall give ten (10) days' notice to the Union in advance of the execution of any lease so that the Union may contact and negotiate with the lessee for the execution of an agreement by the leasee to be bound by the terms and provisions of this Agreement. Failure of the lessee to meet this obligation shall give the Union the right to strike the lessee.

ARTICLE XIII
LOCKER ROOM

Section 1. The Employer shall provide sanitary dressing rooms for all of its employes and lockers with lock and key free of charge for regular employes. An Employer shall be responsible for any losses sustained by its employes for its failure to comply with this provision.

ARTICLE XIV
UNIFORMS

Section 1. If the Employer requests that uniforms be worn by certain employes, such uniforms shall be furnished and laundered by the Employer without cost to the employe.

ARTICLE XV
COMBINATION JOBS

Section 1. When an employe occupies a position which combines two (2) or more job classifications of work, then (except as otherwise provided) such employe shall be paid at the rate of the highest job classification. The Motel may not, by virtue of this

provision, evade the hiring of an employe in a higher job classification where such employe in a higher classification would normally be hired, according to the usage of the trade.

ARTICLE XVI

STUDENT TRAINING PROGRAM

Section 1. This Agreement shall not apply to training programs. Such programs shall be instituted by agreement between the individual Motel and the Union.

ARTICLE XVII

STRIKES AND LOCKOUTS

Section 1. Both the Union and Employer recognizes the service nature of the motel business and the duty of the Motel to render continuous and hospitable service to the public in the way of lodging, food and other necessary motel accommodations. There shall be no lockouts, strikes or work stoppages of any kind prior to the termination date of this Agreement as set-forth in Article XIX following. If neither party gives notice of its desire to negotiate any change in this Agreement not less than sixty (60) days prior to the termination date as set-forth in Article XIX, then there shall be no lockouts, strikes or work stoppage until either party gives notice as provided in Article XIX of its desire to negotiate changes in the terms and provisions of this Agreement.

Section 2. The foregoing provisions of this Article shall not apply in the event the Employer refuses to comply with the arbitration provisions of this Agreement.

ARTICLE XVIII

SALE OR TRANSFERS

Section 1. This Agreement shall be binding upon the successors, assigns, purchasers, lesseees or transferees of the Employer whether such succession, assignment, or transfer be effected voluntarily or by operation of law or by merger or consolidation with another company provided the establishment remains in the same line of business.

ARTICLE XIX

TERM OF AGREEMENT

This Agreement and all Schedules attached hereto shall continue and remain in full force and effect until August 1, 1971, and neither party shall demand any change in this Agreement and

the Schedules attached hereto until the termination thereof on August 1, 1971.

This Agreement shall continue in full force and effect from year to year thereafter, unless either party who desires to negotiate changes in this Agreement and the schedules attached hereto shall service written notice on the other party by registered mail not less than sixty (60) days prior to August 1, 1971.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the _____ day of _____, _____ .

FOR THE HOWARD JOHNSON'S MOTOR LODGE, INC.

CHARLES T. GRISSOM

Witnessed:_____

Dated:_____

FOR THE UNION:

MYRA K. WOLFGANG

Myra K. Wolfgang
SECRETARY-TREASURER

SCHEDULE "A"

Following are the daily minimum wage rates effective on the dates as listed below:

CLASSIFICATION	8-1-68	8-1-69	8-1-70
Maids	$13.00	$13.50	$16.00
Porter	12.79	13.93	16.46
Curb. Houseman & Porter & Maintenance	14.00	15.00	17.50

Date of hire seniority of employes shall determine the order of lay-off and recall after lay-off.

Steady maids working 4 or more days per week shall be paid on the basis of the regular daily rate for steady maids for the number of days actually worked.

Maids shall not be required to do more than 16 rooms within 8 hours of work.

When maids are required to general house-clean rooms, the work load will be reduced by one room for each room that is general house-cleaned.

HOWARD JOHNSON'S
MOTOR LODGE, INC.

CHARLES L. GRISSOM

UNION

MYRA K. WOLFGANG
Myra K. Wolfgang, Secy.

Witness ED J. EDWIN

Dated: January 23, 1969

AGREEMENT

Between

HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

DETROIT LOCAL JOINT EXECUTIVE BOARD

Representing and Acting for

Chefs, Cooks, Pastry Chefs Union No. 234
Bartenders Local Union No. 562
Hotel, Motel and Restaurant Employees Union No. 705
Front Office and Check Room Employees Union No. 880

AND

HOWARD JOHNSON RESTAURANTS

THIS AGREEMENT is effective on the First day of January, 1968 and is made between the Hotel & Restaurant Employees & Bartenders International Union, Detroit Local Joint Executive Board, affiliated with the American Federation of Labor – Congress of Industrial Organizations (AFL-CIO) hereinafter called the "UNION" and Belleville Restaurant Co., Inc., a Howard Johnson Restaurant, located at 45945 Willow Run Expressway, Belleville, Michigan, hereinafter called the "EMPLOYER".

WITNESSETH: That whereas it is to the mutual interest of the respective parties that uniform labor relations standards and regulations prevail in the hotel, motel, bar and restaurant industry,

It is therefore mutually agreed as follows:

ARTICLE I

RECOGNITION – UNION SECURITY

Section 1. The Employer recognizes the Union as the exclusive agency for collective bargaining for all employees.

Section 2. The Employer agrees that as a condition of employment all employees who are presently members of the Union shall retain their membership in said Union and all present employees who are not members and all new employees shall become and remain members of said Union on the thirty-first (31st) day following the beginning of his or her employment or the effective date of this Agreement, whichever is later.

Section 3. The Employer agrees upon the request of the Union to discharge any employee who fails to tender his initiation or reinstatement fees and periodic dues in accordance with the above.

Section 4. Union dues, application fees and reinstatement fees shall be paid by employees through a check-off. However, no such sums shall be deducted by the Employer from any employee's wage unless and until the employee has voluntarily signed a waiver card authorizing the deduction of same, such assignment not being irrevocable for a period longer than one (1) year or the termination of this Agreement, whichever first occurs. The money so authorized shall be deducted from the first pay check each month of the employee's and shall then be remitted to the Local Union.

ARTICLE II

HIRING

Section 1. All employees may be hired through the Union office. In order to facilitate the employment of necessary help, to assure qualified employees of an efficient system of locating employment and insure the Employers of a regular source of available employees, each of the Unions agrees to operate a job referral system in a non-discriminatory manner for employees within their jurisdiction. All persons who are referred to Employers by their respective Unions shall be identified by job referral slips issued by

the referring Union and delivered to the Employer by the individual being referred except as hereinafter provided.

Section 2. It is understood and agreed by the Unions that the operations of said job referral systems shall be on a non-discriminatory basis and in accordance with the following terms, conditions and standards.

(a) It is agreed that the Employers shall have the right to reject any job applicant referred by the Unions. In the event any applicant is rejected, the Employer shall request that additional applicants be furnished by the Unions from their job referral system.

(b) Notices shall be posted in places where notices to employees and applications for employment are customarily posted of all the provisions relative to the functions and operations of said hiring and job referral systems.

(c) In the event a job referral system fails to supply qualified workers to an Employer within forty-eight (48) hours after a request is made, the Employer may engage new employees from any other source except from fee charging employment agencies. The Employer shall notify the Union of the name, address, social security number and date of employment of such new employees within five (5) days after date of hiring.

(d) The Employers agree to hire all extra employees in the manner above provided using the job referral systems operated by the Unions.

(e) The maintenance and operation of the hiring hall provisions of this Agreement shall be undertaken separately and individually by each of the said Unions who are parties to this Agreement and no individual Union shall be bound or responsible for any other Union's maintenance or operation of its respective job referral system which is inconsistent with the express terms of this Agreement.

(f) The Unions shall establish and maintain appropriate registrations for qualified applicants available for employment in the established job classifications, and the conduct of

this activity by the Unions shall be in accordance with the application of the above terms, conditions and provisions.

(g) The Unions agree to permit, newly hired non-Union employees to become members of the appropriate Unions upon making application for membership and the payment of the customary initiation fees and regular dues.

ARTICLE III

GRIEVANCE PROCEDURE

Section 1. If an employee has a grievance under the terms and provisions and during the term of this Agreement, the same shall follow the procedure set forth below... No grievances shall be filed or processed based on facts or events which have occurred prior to seven (7) calendar days before the grievance is reduced to written form *if the grievance is known.*

Step 1. The aggrieved *employee or the Union* shall take the grievance up with the department head.

Step 2. If the grievance has not been settled within seven (7) calendar days, the grievable matter shall be reduced to writing and a copy given to the employer. The aggrieved employee may take the grievance up with his local union who shall attempt to adjust the matter with management.

If the written grievance is not settled within thirty (30) calendar days after it has been reduced to writing, within an additional thirty (30) days, either party may request arbitration of the unadjusted grievance and the other party shall agree to proceed to arbitration.

It is agreed that the renewal or extension or any change or amendment of this Agreement shall not be the subject matter of a grievance which can be submitted to arbitration.

Step 3. Arbitration shall occur under the Voluntary Labor Arbitration Rules of the American Arbitration Association.

The decision of the arbitrator shall be final and conclusive upon both parties and both parties agree to abide by the award of the arbitrator.

The fees and expenses of the arbitrator shall be shared equally between the parties.

ARTICLE IV

HOURS, WAGES, SPECIFIC WORKING CONDITIONS, SPLIT SHIFTS

Section 1. Commencing January 1, 1969, on the basis of the regular work week commencing at 7 a.m. on Monday and ending Sunday, midnight, all employees working in excess of forty-four (44) hours per week during such work week shall receive one and one-half (1-1/2) times their regular hourly rate of pay.

Commencing January 1, 1970, on the basis of the regular work week commencing at 7 a.m. on Monday and ending Sunday, midnight, all employees working in excess of forty (40) hours per week during such work week shall receive one and one-half (1-1/2) times their regular hourly rate of pay.

An employee working over eight (8) hours in any one day shall be paid at the rate of time and one-half his regular rate of pay. Anyone working on the seventh (7th) consecutive day within the same work week shall be paid at the rate of double time, however, there shall be no pyramiding of overtime. Any regular full time employee legally reporting for work on any legally scheduled work day shall be paid in full for said day, if he is available for work.

Section 2. Employees may be required to work overtime if they are given twenty-four (24) hours' notice of such required overtime. In emergencies, overtime may be required without such notice. Overtime shall be rotated among the employees in the classification required to work such overtime and overtime shall be equalized within a reasonable period of time.

Section 3. Wages for all steady employees shall be paid weekly. Wages for all extra employees shall be paid at the end of their work shift.

Section 4. The wage scales herein noted shall be exclusive of meals, laundry, linens, and repair on all working equipment. Wage rates and certain other conditions are contained in Exhibit A attached hereto and made a part hereof by reference.

Section 5. Split shift shall not be permitted in any department unless so indicated on the wage schedule.

Section 6. When an employee occupies a position which combines two or more job classifications of work, then such employee shall be paid at the rate of the highest job classification.

In cases of emergency and at the request of the employer, an employee may be temporarily assigned to advertise his or her regular classification within the jurisdiction of the local Unions. However, the employee shall be paid the regular rate of his job or the rate of the classification to which he or she is assigned, whichever is higher. [Illustration: a fountain girl or waitress assigned to take cash.]

Supervisors and/or management shall not perform bargaining unit work except in cases of an emergency.

Section 7. If new classifications are established, coming within the jurisdiction of the Unions party to this Agreement, negotiations will be entered into for the schedule of wages and other terms and conditions of employment which shall govern said new classifications.

Section 8. No employee shall at any time be deprived of any advantage or privilege heretofore enjoyed nor shall it operate to deprive any employee from receiving a wage higher than the Union scale in consideration of superior knowledge and ability. There shall in no event and at no time be a reduction in wages or deprivation of benefits to any employees covered by this Agreement except by mutual written agreement between the Employer and the Union. Nor shall any settlement or compromise of any claims for back wages, overtime, or other benefits, provided by this Agreement be binding upon any employee or former employee unless such settlement or compromise shall have been approved in writing by the duly authorized representatives of the Union. This Agreement embodies the entirety of the agreement and no agent

or member of the Union is authorized to waive or modify any provision thereof.

ARTICLE V

HEALTH, WELFARE, PENSION PROGRAM

Section 1. The Employer agrees to contribute to the Hotel & Restaurant Employees Insurance Funds the sum of thirty cents (30¢) per day per employee from the first date of employment. The minimum contribution on steady employees (i.e. an employee who works four days per week) shall be $1.50 per week, and shall be made upon forms furnished by the Hotel & Restaurant Employees Insurance Fund.

Section 2. Commencing on and after December 1, 1970, the Employer shall contribute the sum of forty cents (40¢) per day for each day worked by an employee covered by this Agreement to the Hotel & Restaurant Employees Pension Fund for the purpose of establishing and paying pensions to eligible employees as provided in an Indenture of Trust establishing the Hotel & Restaurant Employees Pension Fund.

Section 3. Contributions are payable for any period when an employee is on a paid vacation.

Section 4. Contributions are due on the 10th of the month following the month for which they are due. Failure on the part of the Employer to make contributions as provided for herein shall render the Employer liable for claims to the full extent of all allowable benefits, and for all contributions due hereunder.

ARTICLE VI

MEALS

Section 1. The parties agree that, in the interest of maintaining continuous service to customers, the employees of the Employer shall consume their meals on the premises at such time, and in such manner as the Employer deems necessary for his convenience, and the cost of such meals shall not be included in any report for income tax purposes. The employees agree to accept

one such meal for each meal worked in such establishments as sell food, and for which no charge shall be made to the employee. One such meal shall be eaten on the Employer's time.

ARTICLE VII

VACATIONS – PAID HOLIDAYS

Section 1. After an employee has been in the employment of the Employer, or the establishment in which he is employed for twelve (12) months, he shall be entitled to one week's vacation with pay, payable in advance. After such employee has been in the service of the Employer for twenty-four (24) months, he shall be entitled to two (2) weeks' vacation with pay, payable in advance. And, after an employee has been in the service of the Employer for ten (10) continuous years of employment, he shall be entitled to three (3) weeks' vacation with pay, payable in advance. Pay for the vacation period shall be computed on the average weekly pay received by such employee during the year preceding the vacation. If any employee is discharged, laid off, or quits (providing he gives two (2) weeks' notice) he shall be entitled to vacation pay prorated according to the actual service performed and upon the basis of two (2) weeks' pay unless employment has been less than one (1) year, in which case proration shall be based upon one (1) week's vacation; provided further that the employee has been in the service of the Employer for at least four (4) months from the date of his employment. Temporary layoffs or leaves of absence shall not interrupt the continuity of employment for the purpose of eligibility for vacation.

Layoffs or leaves of absence extending beyond sixty (60) calendar days shall reduce vacation pay by one-twelfth (1/12th) for each such additional thirty (30) days.

Section 2. Unworked Holiday Pay. Steady employees shall be paid for the enumerated holidays at their regular straight-time hourly rate (for the number of hours for which the employee would have been scheduled for that day if it were not a holiday) if not worked and if the holiday falls on a day for which the employee would have been scheduled to work.

Paid holidays are:

HOLIDAY	COMMENCING
Mother's Day	In effect
Easter Sunday	In effect
Christmas Day	In effect
Thanksgiving Day	1968
Memorial Day	1969
4th of July	1970

To qualify for unworked holiday pay, an employee must meet all of the following conditions:

(a) The employee must have completed his (her) probationary period of thirty (30) days prior to the holiday; and

(b) The employee must be on the active payroll of the holiday work week and must work his last scheduled work day prior to and his next scheduled work day after the holiday. An eligible employee absent during the holiday week because he is on an approved vacation shall receive pay for the holiday in accordance with the provisions of this section.

If an employee works on any of the above enumerated holidays after their effective date, time and one-half the employee's regular hourly rate shall be paid for the hours actually worked. If an employee is scheduled to work on the holiday but fails to report and actually perform work on the holiday, he shall not be paid for that day unless the employee is excused by the Employer because of sickness or physical disability.

ARTICLE VIII
LEAVE OF ABSENCE AND SICK LEAVE

Section 1. Leaves of absence without pay for reasonable periods of time, not to exceed four (4) months, shall be granted by an Employer to employees for reasons of bona fide illness and maternity leave of one hundred eighty (180) days. Such leaves of absence for bona fide illness and maternity leaves shall not affect employees' vacation or seniority rights except as provided in Article VII, Section 2.

Section 2. Leaves of absence without pay not to exceed two (2) months may be granted by mutual agreement between the Employer and the employee for other reasons but under such conditions the Employer shall determine the extent, if any, to which vacation rights shall be affected.

Section 3. Any leave of absence that may be granted may be extended, with the approval of the Employer, beyond the time allowed therefor as set forth above.

Section 4. An employee who has a vacation accrued at the time of being granted an approved leave of absence or who is absent because of illness may elect to include such accrued vacation in his time off.

Section 5. All leaves of absence and extensions of leave of absence must be in writing signed by the Employer and a copy sent to the Union.

ARTICLE IX
SENIORITY

Section 1. New employees shall be considered probationary employees and shall not acquire any seniority rights until they have been employed for a period of thirty (30) calendar days.

Section 2. The Employer agrees to recognize seniority in specific job classifications within each department and that employees in specific job classifications within each department shall be promoted, demoted, laid off and recalled to work according to their length of service, provided, however, that the employee qualifies for the specific job classification within the department.

Section 3. Seniority rights shall terminate, if an employee:

(a) Quits or retires;

(b) Is discharged for cause;

(c) Fails to return to work from an approved leave of absence;

(d) Is absent for three (3) consecutive days without notice to the Employer except in any event where an

employee is unable to give such notice to the Employer due to circumstances beyond his control. In such event, the employee shall give notice to the Employer as soon as possible, but, in no event, more than ten (10) days from absence otherwise his seniority shall terminate.

(e) Is laid off for a period equal to his seniority or two (2) years, whichever is the lesser period of time.

Section 4. Approved leaves of absence shall be considered as time worked in the computation of seniority.

Section 5. No extra employees in job classifications shall be used where seniority employees within the same job classifications are on layoff except in cases of emergency, or where the Employer cannot contact laid off employees in the same job classification.

ARTICLE X
UNIFORMS

Section 1. The Employer shall furnish and launder all uniforms except as otherwise provided herein, and linens and sharpen the cooks' tools whenever necessary. Where waiters or waitresses are employed and standard uniforms are worn, waiters and waitresses shall supply such uniforms at their own expense. The regulation black dress, white collor, white cuffs, and apron, or the white dress and white apron shall be considered the regulation waitress uniform. Black plants and black alpaca coat shall be considered the standard waiter's uniform. The regulation uniform for bartenders shall be black tie, white shirt, black pants and black shoes. The regulation uniform for barmaids shall be white blouse and dark skirt. All other uniforms shall be paid for and serviced by the Employer.

Section 2. Whoever furnishes uniforms, employer or employee, shall maintain them.

Section 3. Dining room and counter waitresses shall comply with the requirements for dress and uniforms that appear on Page 2, Standards of Appearance, of the Howard Johnson Manual dated and amended July, 1967. All employees shall be given a copy of

such booklet, "Johnson Girl," and from time to time shall be advised of modifications, additions or deletions to the aforesaid Standards of Appearance.

ARTICLE XI
GENERAL PROVISIONS

Section 1. The Employer shall be responsible for the safekeeping of employees' clothing and work tools in a place to which the public shall not have access, and shall be the insurer of the value of the same in the event of loss through fire or theft. The Employer shall provide a clean and comfortable dressing room for the employees.

Section 2. No employee shall be required to work with non-Union employees, except probationary employees, and such refusal shall not be made the basis of discharge or other disciplinary action. The employees shall work while they are ready and able to work. All parties to this Agreement represent that they will endeavor to the best of their ability to carry out all its terms and provisions.

Section 3. No employee shall be discriminated against for giving information regarding alleged violations of this Agreement to the Unions.

Section 4. The Employer shall grant the necessary time off without pay to any employee designated by the Union, to serve in any capacity on official Union business. Where it is the practice to pay employees for time off on Union business, same shall be continued.

Section 5. The Employer shall, at each regular pay period, give to each employee a statement of all social security tax, withholding tax, deductions from pay, etc. It shall be the duty of the Employer to make and preserve a complete record showing wages paid and hours worked by all employees covered by this Agreement as well as a complete record of all Insurance contributions made in accordance with Article V, Health–Welfare–Pension Program, Sections 1 and 2. The Employer shall upon request make such records available for inspection by any authorized representative of the Union.

Section 6. All employees covered by this Agreement shall be covered by Workmen's Compensation Insurance and by the Michigan Employment Security Act.

Section 7. A copy of this contract shall be posted in a prominent place to which the public shall not have access.

Section 8. A bulletin board will be provided for the sole use of the Union for posting notices of meetings and other proper Union activities.

ARTICLE XII
CONCESSIONNAIRE CLAUSE

Section 1. In the event the Employer leases or turns over to any person or persons the operation of any department of his establishment, the Employer shall give the Union ten (10) days' notice in advance of such contemplated lease or arrangement. The Employer shall also require of such tenant or other person as a condition precedent to such tenancy or arrangement that such tenant or other person shall fully observe all provisions of this Agreement and that his failure to do so completely and entirely shall represent a breach of tenancy for which eviction shall occur. Furthermore the Employer shall be personally liable for any and all damages resulting from the failure of the lessee or other person to observe any and all terms of this Agreement.

ARTICLE XIII
SALE OF TRANSFER

Section 1. It shall be the duty of the Employer to inform the Union in writing at least ten (10) days in advance of any sale, transfer or other changes in ownership. Failure on the Employer's part to so notify the Union shall render the Employer liable for any subsequent failure of the new owner to pay the employees on the basis of the provisions of this contract, said liability to extend for the period of one (1) week after the change in ownership or until the Union receives notice of such change, whichever occurs later.

Section 2. This Agreement shall be binding upon the employer's successors, assigns, purchasers, lessees or transferees

whether such succession, assignment or transfer be affected voluntarily or by operation of law; and in the event of the employer's merger or consolidation with another company or companies, this Agreement shall be binding upon the merged or consolidated company, provided the establishment remains in the same line of business.

ARTICLE XIV
NO STRIKE – NO LOCKOUT

Section 1. Under no circumstances will the union cause or permit its members to cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in or slowdown in any establishment of the Employer or any curtailment of work or restriction of production or interference with the operations of the Employer or any picketing or patrolling during the terms of this Agreement. In the event of a work stoppage, other curtailment of production, picketing or patrolling, the Employer shall not be required to negotiate on the merits of the dispute which gave rise to the stoppage or curtailment until same has ceased.

Section 2. The Employer will not lockout any employees during the term of this Agreement.

ARTICLE XV
MANAGEMENT RIGHTS

Section 1. Nothing in this Agreement shall be construed to limit or impair the right of the Employer to exercise its own discretion on all of the following matters, whatever may be the effect upon employment, when in its discretion it may determine it advisable to do any or all of the following:

to management its business generally,
to decide the number and location of stores,
to decide all equipment to be used,
to decide all items to be served or sold,to decide the method and means of sale of products,
to determine work schedules for employees,
to hire, layoff, assign, transfer and promote employees (a complaint by Local 234 of improper classification shall

result in a joint job-content analysis to determine the validity of same),
to determine the qualifications of employees,
to determine and redetermine job content,
to determine the starting and quitting time,
to determine the number of hours to be worked,
to make such reasonable rules and regulations not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety and/or effective operation and after advance notice thereof to the union and the employees, to require compliance therewith by employees,
to discipline and discharge employees for cause.

Section 2. The delineation of Management Rights shall be subject to the express terms of other provisions of this Agreement and to the Grievance Procedure.

ARTICLE XVI
EQUAL TREATMENT

Section 1. If, during the term of this Agreement, the Union negotiates a contract with Employers having a Howard Johnson franchise, the terms of which are more favorable than those contained herein, in that event, the Employer may, at the expiration of a ten (10) day written notice to the Union, automatically incorporate such more favorable terms into this Agreement.

ARTICLE XVII
SAVING PROVISION

Section 1. If any provision of this Agreement shall be, or become, invalid by reason of any applicable Federal or State Law, or be held invalid by any court or agency of competent jurisdiction, remaining portions thereof shall not be invalid, but shall continue in full force and effect.

ARTICLE XVIII
DURATION

Section 1. This Agreement shall remain in full force and effect from and after January 1, 1968 and shall continue in full

force and effect until March 31, 1971 and thereafter from year to year. Should either party desire to make any changes in this Agreement, such party shall, not less than sixty (60) days prior to March 1, 1971 serve notice on the other party by certified mail.

IN WITNESS WHEREOF: The parties representing that they have authority to do so, have hereunto subscribed their names on the said day and year.

HOWARD JOHNSON RESTAURANT

Belleville Restaurant Co., Inc.
Company Name

By _____
Title

HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, DETROIT LOCAL JOINT EXECUTIVE BOARD, AFL-CIO

_____
(President)

MYRA K. WOLFGANG
(Secretary)

EXHIBIT "A"

Following are the minimum wage rates, per day, effective on the dates listed below:*

Local 234	3-1-68	1-1-69	1-1-70
Head Cooks	15.00	15.50	16.00
Other Cooks	13.50	14.00	14.50
Bakers	13.50	14.00	14.50
Grill & Sandwich	12.50	13.00	13.50
Pantry	12.00	12.50	13.00
Utility (new classification	10.60	11.00	12.00

Local 705	3-1-68	1-1-69	1-1-70	7-1-70	12-1-70
Waitress	8.50	9.00	9.50	9.75	10.00**
Fountain waitress	8.75	9.25	9.75	10.00	10.00**
Fountain service	9.05	9.55	10.05	10.30	10.55

These rates are for actual hours worked, but with a minimum of 3½ scheduled hours per day. Split shift is permitted at $1.00 per day additional, overall work day not to exceed eleven (11) hours.

Bus Boys	9.05	9.55	10.05

These rates are for actual hours worked, but with a minimum of 4 scheduled hours per day. Split shift is permitted at $1.00 per day additional, overall work day not to exceed eleven (11) hours.

Hostess	12.50	13.00	13.50
Porter	11.50	12.00	12.50

*For the period from January 1, 1968 through February 29, 1968, all unit employees shall receive twenty-five cents (25c) per day increase (full retroactivity in accordance with the minimum wage rates commenced March 1, 1968). Except as provided above, for the calendar year 1968 all present employees in all job classifications shall receive not less than fifty cents (50c) per day increase over their present rate or a five percent (5%) increase over the existing rate, whichever is higher.

**Fountain and dining room waitresses shall not be raised over the ten dollars ($10) rate before December 1, 1971 (this promise carries over into any renewal of this Agreement).

Local 562	3-1-68	1-1-69	1-1-70
Bartenders-Front	20.00	21.00	22.00
Bartenders-Service	23.00	24.00	25.00
Local 880			
Cashiers	12.50	13.00	13.50

RATE FOR NEW HIRES. For the first thirty (30) days of employment for all new employees hired into the unit classifications, the Employer shall be permitted to pay fifty cents (50c) per day less than the minimum wage rates.

Exhibit C

ADDENDUM

THIS Addendum to the Collective Bargaining Agreement dated January 1, 1968, by and between the Hotel and Restaurant Employes and Bartenders International Union, Detroit Local Joint Executive Board, AFL-CIO and the Howard Johnson's restaurant located at 45915 Willow Run Xway, Belleville, Michigan shall become effective May 1, 1971.

ARTICLE V

HEALTH WELFARE PENSION PROGRAM

Section 1. The Employer shall contribute to the Hotel and Restaurant Employes Insurance Fund the sum of 45c per day from the first day of employment for each day worked, with a minimum of $2.25 per week for each week worked by steady employes. The Employer shall contribute to the Hotel and Restaurant Employers Insurance Fund the sum of 45c per day for each day worked by all other employes covered by this Agreement. Such contributions shall be used for insurance coverage to provide benefits for employes eligible for benefits.

Section 2. The Employer shall contribute, in addition, to the contributions provided in the preceding Section, the sum of 40c per day for each day worked by an employe covered by this Agreement to the Hotel and Restaurant Employes Pension Fund for the purpose of establishing and paying pensions to eligible employes as provided in an Indenture of Trust establishing the Hotel and Restaurant Employes Pension Plan.

Section 3. Contributions as provided in the foregoing Sections are payable for any period while an employe is on a paid vacation or for a paid holiday.

Section 4. Contributions are due on the 10th of the month following the month for which they are due. Failure on the part of an Employer to make contributions as provided for herein shall render the Employer liable for claims to the full extent of all contributions due hereunder.

ARTICLE VII
PAID HOLIDAYS

Section 1. remains the same.

Section 2. Effective May 1, 1971, if an employee works on Mothers Day or Christmas Day they shall receive double time, the remaining holidays at time and one-half.

Effective May 1, 1972, if an employee works on Mothers Day, Christmas, Thanksgiving Day or Memorial Day they shall receive double time, the remaining holidays at time and one-half.

As of May 1, 1973 if an employee works on any of the Holidays they shall receive double time.

EXHIBIT A

The following dates all employees shall receive not less than a fifty (50¢) per average increase – May 1, 1971, May 1, 1972 and May 1, 1973.

Local 234	5-1-71	5-1-72	5-1-73
Head Cook	$23.00	$23.50	$25.00
Cook	20.00	20.50	21.00
Baker	20.00	20.50	21.00
Grill & Sandwich	16.00	17.00	18.50
Pantry	15.50	16.00	18.00
Central Utility	15.00	15.50	16.75
Local 785			
Waitress	10.50	11.00	12.00
Fountain waitress	10.50	11.00	12.00
Fountain Service	11.05	11.55	12.55
Porter	15.00	16.00	17.50
Hostess	15.50	16.50	20.00
Bus Help	13.00	14.00	15.00
Local 880			
Cashiers	15.50	16.50	20.00
Local 562			
Bartender	25.00	26.50	28.00

J.K. R.T.F.
EMPLOYER INITIALS

R.F.
UNION'S INITIALS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

HOWARD JOHNSON COMPANY, INC.

Petitioner

v

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Howard Johnson Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 1a-12a), is reported at ____ F2 ____, 83 LRRM 2804 (6th Cir. 1973); the opinion of the District Court for the Eastern District of Michigan, Southern Division (App. B, infra, pp. 13a-26a) is reported at ____ F Supp ____, 81 LRRM 2329 (E.D. Mich. 1972). The District Court's Order and subsequent Memorandum and Order Granting Stay Pending Appeal are attached as Appendices C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals was decided and filed on July 12, 1973. This Petition for Certiorari was timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is an employer who purchases the assets of a former owner a "successor employer" for purposes of federal labor law if thereafter it operates with different procedures and supervision, employs only nine of the fifty-three employees employed by the former owner, contractually refuses to assume the former owner's collective bargaining agreement, and a majority of its employees have not designated the union, which has exclusive bargaining status under such bargaining agreement, as their representative?

2. Is an employer who purchases assets required, in an action under Section 301 of the Labor Management Relations Act, 29 USC § 185, to arbitrate the extent to which a labor contract, to which it is not a party, imposes obligations upon it if such employer employs a new labor force in which the employees employed by the former owner do not constitute a majority of either such employer's employees or the former owner's employees?

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, as amended, 29 USC 141 et seq. are as follows:

> Section 157: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected

by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 158(a): It shall be an unfair labor practice for an employer . . .

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . .

Section 185(a): Suits for violation of contracts between an employer and a labor organization representing employees employed in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner, Howard Johnson Company, Inc., on June 16, 1972, agreed with Charles T. Grissom, P. L. Grissom & Son, Inc., and Belleville Restaurant Company[1] to purchase certain assets for use in the operation of a Howard Johnson restaurant and motor lodge located in Belleville, Michigan. Grissoms had previously operated the restaurant and motor lodge as franchisees of Peti-

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[1] For convenience, Charles T. Grissom, P. L. Grissom & Son, Inc., and Belleville Restaurant Company will hereafter be referred to as Grissoms.

tioner. At the time of the purchase, Grissoms had collective bargaining agreements with Respondent, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, which covered employment terms and conditions for Grissoms' employees in the restaurant and motor lodge. Respondent's agreement with Grissoms for the motor lodge was effective for the period August 1, 1968, to August 1, 1972. Respondent's agreement for the restaurant employees was effective for the period January 1, 1968, to March 31, 1971, and extended by addendum until May 1, 1974. Both of Respondent's labor agreements with Grissoms contained a grievance procedure culminating in arbitration. The arbitration provision in the motor lodge agreement is representative and provides for the initiation of arbitration, and the selection and authority of the arbitrator:

> Section 1. If an employee has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set forth:
>
> * * *
>
> *Step 3.* If the grievance cannot be settled by Step 2, it shall be presented by the Union to the Employer who shall make a decision in two (2) weeks. If the decision of the Employer is unacceptable either to the Union or to the Employer, either party shall have the right to demand arbitration in accordance with the following step.
>
> *Step 4.* The arbitrator shall be selected from a list furnished by the American Arbitration Association within two (2) weeks after such list is furnished to the parties. Upon the appointment of an arbitrator selected from a list furnished by the American Arbitration Association, the subject matter of the grievance shall be submitted to the arbitrator within five (5) days after the selection of the arbitrator unless the parties mutually agree upon a longer period of time. Evidence shall be submitted by both parties within ten (10) days thereafter. The decision of the arbitrator shall be final and conclusive

upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties. Failure of the parties to agree upon an arbitrator within the period of time set forth above shall give the employee the right to strike to solve unsettled grievances.

Section 2. An arbitrator shall not have any right or authority to add to, subtract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be subject matter of any grievance or arbitration procedure. (Joint Appendix on Appeal, p. 100)

After reaching agreement with the Grissoms for purchase of certain assets, Petitioner began to hire its own employees and to prepare for instituting its own operational procedures for the restaurant and motor lodge. During early July, 1972, Petitioner advertised for employees through newspapers and notices posted in various places, including the motor lodge and restaurant. On July 12, 1972, Petitioner commenced interviewing applicants for employment at a Howard Johnson facility in Ann Arbor, Michigan. Petitioner hired its first employee on July 18th and two days later began a training program for its employees. When it began operations on July 24, 1972, Petitioner had thirty-three employees in the restaurant and twelve in the motor lodge. Of these employees, only 9 restaurant employees had previously worked for Grissoms; while none of the lodge employees had previously worked for Grissoms. Thus, seventy-three percent (73%) of Petitioner's restaurant employees and one hundred percent (100%) of its lodge employees had never worked for Grissoms, nor been represented by Respondent, nor covered by Grissoms' labor agreements with Respondent.

On July 9, 1972, prior to the closing of the purchase agreement between Grissoms and Petitioner, Grissoms distributed a notice to their restaurant and motor lodge employees which stated:

Notice is hereby given that as of midnight July 23, 1972, your employment with Belleville Restaurant Company, a

> Michigan corporation, shall be terminated unless the last date you are scheduled to work is prior to midnight July 23, 1972, which date will be the termination date of your employment.
>
> All vacation accrued up to midnight, July 23, 1972, as well as pay earned as of said date, will be paid on July 24, 1972. (Joint Appendix on Appeal, p. 88)

On July 11, 1972, Petitioner notified Respondent in a telephone conversation that:

> "The Howard Johnson Company does not accept or recognize any alleged contracts for either the Restaurant or the Motor Lodge or any successor clauses contained therein. It will not recognize the Union as the bargaining representative for the Restaurant or Motor Lodge unless or until it is certified by the National Labor Relations Board as the bargaining representative of employees in an appropriate unit." (Joint Appendix on Appeal, p. 35)

Later, Petitioner again advised Respondent that it would hire its own employees and would not merely hire all of Grissoms' terminated employees. (Joint Appendix on Appeal, p. 90).

On July 21, 1972, Respondent filed suit in state court against Grissoms and Petitioner to require both Grissoms and Petitioner to arbitrate and to rehire and/or reinstate Respondent's members. The case was removed to the Federal District Court for the Eastern District of Michigan, Southern Division. During proceedings before the District Court, Grissoms stipulated to the entry of an order requiring arbitration of their liability under the collective bargaining agreements. On August 22, 1972, the District Court entered a memorandum opinion finding Petitioner a successor employer and thereby bound to arbitrate the applicability of the terms and conditions of Grissoms' labor agreements with Respondent. After timely appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Sixth Circuit Court of Appeals Failed to Apply the Decision of this Court in *Burns*.

This case presents an important issue in the development of a uniform federal labor law under the Labor Management Relations Act, 29 U.S.C 141 et seq. ("Act"): whether an employer, a great majority of whose work force were not employees of the former owner, is a "successor employer" and, therefore, required to arbitrate the applicability of its predecessor's labor agreement. Additionally, this case involves the perplexing issues relative to the proper interpretations and interrelationship of *John Wiley & Sons* v *Livingston*, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909 (1964) and *NLRB* v *Burns International Security Services, Inc.*, 406 US 272, 32 L Ed 2d 61, 92 S Ct 1571 (1972).

This Court in *NLRB* v *Burns International Security, Inc.*, *supra*, clarified the law as to the obligations of successor employers in the labor relations area. In *Burns*, the Court found that the employer had a duty to bargain only "when it selected as its work force the employees of the previous employer to perform the task at the same place they had worked in the past".[2] Stated conversely, under *Burns* an employer cannot be a successor[3]

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[2] 406 US at 278. Justice White, writing the majority opinion in *Burns*, stated: "Burns' obligation to bargain with the Union over terms and conditions of employment *stems from its hiring of Wackenhut's employees* and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period, if a majority of employees after the change of ownership or management were employed by a preceding employer". (Emphasis added) 406 US at 278-279.

[3] The Eighth Circuit in *NLRB* v *Polytech, Inc.*, 469 F2d 1226, 1230 (8th Cir. 1972), stated: "Under *Burns*, it is the number of new employees and whether they are a majority that is important." The Seventh Circuit in *NLRB* v *Bachrodt Chevrolet Co.*, 468 F2d 963 (7th Cir. 1972); vac'd & rem'd 411 U.S. ——— , 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973), held that the purchasing employer was a successor because it planned to retain all of the seller's employees and ultimately hired a majority of the seller's employees. In its opinion, the Court stated: "In *Burns*, the duty to bargain did not mature until late June, at the point when it became clear that the successor had hired the requisite complement of his predecessor's employees." 468 F2d at 969.

unless and until either a majority of its work force is comprised of the predecessor's employees, or it hires a majority of the predecessor's employees.[4] The only exception to the *Burns* criteria recognized by the federal courts, prior to the Sixth Circuit's decision, involved an employer who unlawfully discriminates against the predecessor's employees by refusing to hire them to avoid successorship status.[5] Such discriminatory conduct is prohibited by Section 158(a)(3) of the Act. Respondent does not allege in this case, nor did it file a charge with the National Labor Relations Board ("NLRB") alleging that Petitioner's refusal to hire Grissoms' employees is discriminatory.

The Sixth Circuit refused to apply this Court's *Burns* criteria because it viewed *Burns* as inapposite since it involved an alleged violation of Section 158(a) (5) of the Act rather than Section 185(a) of the Act.

This is fundamental error, for the determinative criterion for successorship is whether Petitioner has employed a majority of its predecessor's employees, and not whether a particular case arises under Section 158 or Section 185 of the Act. The initial determination must concern the composition of Petitioner's labor force, for it is this determination which controls whether a collective bargaining contract of another employer is to be applied to it. The Court below improperly held that the contract of a former employer could be applied to determine obligations of Petitioner and rights of Petitioner's employees even though the great majority of Pefitioner's employees were not employed by the former employer nor represented by Respondent. Petitioner's liability, if

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[4] There has been some confusion surrounding the "majority of employees" concept. Various courts apply it per *Wiley* - i.e., construing it to mean a majority of the predecessor's employees. Other courts have used it to refer to an existing majority of former employees in the new employer's work force. This distinction is irrelevant for purposes of this case, since Petitioner's labor force did not include either type of majority. Unless otherwise indicated, the term "majority of employees" encompasses both situations.

[5] See *K. B. & J. Young's Super Markets, Inc.* v *NLRB*, 377 F2d 463 (9th Cir. 1967); enforcing 157 NLRB 271 (1966).

any, under a labor contract follows only if Petitioner is a successor, and, under *Burns*, Petitioner is a successor only if the majority of its employees come from the predecessor's labor force. If this were not so, every purchaser of a business desiring to continue its operation, even though with all new employees, would be required to take such part of its predecessor's labor contract as an arbitrator should decide. This does mean, if the arbitrator wishes, that the employer must recognize the exclusive bargaining status of the union and the seniority of the predecessor's employees.

The Sixth Circuit and the District Court justified this erroneous result on an unwarranted extension of *John Wiley and Sons* v *Livingston, supra.*

In *Wiley*, this Court held that "in the context of a merger situation against a background of state law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation," the surviving corporation which employed all of the predecessor's employees is required to arbitrate the grievances of such employees, and only such employees. The *Wiley* determination is based on a fact situation clearly not present in this case – Wiley continued to employ the same persons employed by the predecessor employer to perform the same work.

Nothing in *Wiley* permitted arbitration so as to apply a contract to the successor's employees, but only to employees hired by the successor who were specifically covered by the labor contract between the union and the former owner.[6]

As interpreted in *Burns*, *Wiley* is not an open-ended decision which makes a predecessor's labor agreement binding in any respect on a new employer, such as Petitioner, which has not

[6] In footnote 5 of the *Wiley* decision, this Court stated:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises."

The most that can be said for *Wiley* is that *if* Petitioner had made a "wholesale transfer" of Grissoms' employees, arbitration would have been appropriate for Grissoms' former employees. Such arbitration, however, has no validity when Grissoms' former employees represent such a small percentage of Petitioner's labor force – far from the "wholesale transfer" of employees present in *Wiley*.

employed a majority of the predecessor's employees, is not liable for the predecessor's debts and obligations, and has not expressly assumed the predecessor's labor agreement.[7]

There is no law or contract binding on Petitioner which would require Petitioner to hire or to continue to employ its predecessor's employees, yet the Court below has determined that an arbitrator may decide, on the basis of a predecessor's collective bargaining agreement, to which Petitioner was not a party, that the predecessor's employees have employment rights and that Petitioner has contractual obligations. Nothing in this Court's *Wiley* decision justified such a conclusion. Significantly, this conclusion is directly in conflict with the decision of the Court of Appeals for the District of Columbia in *Tri State Maintenance Corp.* v *NLRB*, 408 F2d 171 (D.C. Cir. 1968).[8]

The decision of the Court of Appeals imposes on Petitioner, on the basis of a predecessor's labor agreements, to which Petitioner was not a party and which did not apply to eighty percent of Petitioner's employees, an open-ended obligation of arbitration. Issues for the arbitration would include whether, in the first instance, Petitioner is required to take Grissoms' employees when it purchased assets from the Grissoms, what employment rights the predecessor's employees have, and whether Petitioner has contractual obligations which foreclose it from hiring its own labor force.

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[7] In *Burns*, Justice White, speaking for the Court concerning the precedential value of *Wiley*, stated: "Rather, the claim is that Burns must be held bound by the contract executed by Wackenhut, whether Burns has agreed to it or not and even though Burns made it perfectly clear that it had no intention of assuming that contract. *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." 406 US at 286.

[8] The Court there stated: "In the long history of labor law in this jurisdiction there simply is no authority which would require a maintenance corporation which contracts to service a building for a one year period to hire "en masse" the entire work force employed by the corporation or sole proprietor which or who had contracted to service the building for the previous one year period." 408 F 2d at 173.

Such obligation would necessarily infringe on the rights of employees hired by Petitioner who, exercising their rights under Section 157 of the Act, refrain from joining and/or designating the Respondent as their collective bargaining representative. It further infringes on Petitioner's right to employ its own labor force.[9]

The impact of the Sixth Circuit's decision is not only to foreclose Petitioner from hiring its own employees, but also from establishing terms and conditions of employment when it purchases assets of a predecessor, unless an arbitrator decides it may do so. This result is both contrary to this Court's rationale in *Burns*[10] and to the Sixth Circuit Court of Appeals' own decision

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[9] Justice White, in his opinion for the Supreme Court in *Burns*, stated: "We also agree with the Court of Appeals that holding either the Union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." 406 US at 287-288.

[10] In *Burns*, Justice White, pointing out why a predecessor's contract is not binding on a successor, stated: "The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective bargaining agreement. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the preexisting contract's provisions with respect to wages, seniority rights, vacations, privileges, pension and retirement fund benefits, job security provisions and the like would devolve on the successor . . . A successor employer might also be deemed to have inherited its predecessor's preexisting contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred." 406 US at 288-289.

in *NLRB* v *Wayne Convalescent Center, Inc.*, 465 F2d 1039 (6th Cir. 1972) wherein the Court specifically stated that an employer who did not hire a majority of its predecessor's employees may establish its own terms and conditions of employment.[11]

It is the very essence of the national labor policy that a union must represent a majority of employees in an appropriate bargaining unit prior to being entitled to the status of an exclusive bargaining agent. The Court of Appeals decision derogates from this established policy since it imposes upon Petitioner and its employees the duty to arbitrate under a contract which both states that the Union is the sole representative of the employees and requires union membership as a condition of employment, although the employees have had no opportunity to determine the question of representation. This contract interpretation, which the arbitrator is authorized to make under the Court's decision, is contrary to Section 157 of the Labor Management Relations Act.

II. The Sixth Circuit's Decision, by Applying Different Standards to §185 Cases as Opposed to §158 Cases, Both Creates a False Dichotomy Prohibited by this Court's Mandate to Fashion a Single, National Labor Law and Encourages Forum Shopping.

In its opinion, the Sixth Circuit adopts the theory that different standards for determining "successorship" are applicable to

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[11] The Court in *Wayne Convalescent* stated: "While it is clear that Wayne was under a duty to bargain with the union as the employee's representative, it does not follow that the unilateral changes in conditions of employment that Wayne made sometime in June, 1970 were violations of such duty. In *NLRB* v *Burns International Security Services, Inc., supra*, the Supreme Court held that a sucessor could establish the initial basis on which it hired the predecessor's employees without consulting the union representatives and without committing an unfair labor practice." 465 F2d at 1042.

actions brought under §185 in the federal district court than to §158 proceedings before the NLRB.[12] No such dichotomy is warranted either by the statutes involved or consistent interpretations of federal labor law. In fact, such a dichtomy is specifically prohibited by this Court's decision in *Textile Workers Union* v *Lincoln Mills*, 353 US 448, 1 L Ed 2d 972, 77 S Ct 912 (1957):

> "The question then is, what is the substantive law to be applied in suits under §301? We conclude that the substantive law to apply in suits under §301 (a) is federal law which the courts must fashion from the policy of our national labor laws (Citations omitted). The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of legislation and fashioning a remedy which will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problems." 353 US at 456-457.

This dichotomy, admittedly created by the Court of Appeals,[13] will result in widespread forum-shopping and will be a continuing

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[12] In its opinion, the Sixth Circuit, comparing the standard for determining successorship in a §185 (§301) case to a §157 unfair labor practice charge, stated:

> "Apparently the same considerations apply to actions under §301 (§185) of the LMRA." (Appx. A, p. 5a.).

Nevertheless, the Court later held:

> "Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, *at least in this §301 case.*" (Emphasis added) (Appx. A, p. 7a).

The Court thus creates in its specific holding a distinction in the standards for determining successorship in §185 and §158 cases.

[13] In footnote 13 of its opinion in this case, the Court of Appeals for the Sixth Circuit acknowledged that it had sanctioned the dichotomy: "The [defendant] suggests that the approach adopted in this case will make the employees' and the employer's rights contingent on the choice of forum. We do not disagree with this characterization, but feel that it follows from the first ground on which *Burns* distinguished *Wiley* – that the NLRB is expressly limited by Sec. 8(d) of the Act while an arbitrator is under no such restrictions."

source of confusion for the Courts, the NLRB, and those affected by application of federal labor law.

The Sixth Circuit's decision leads to the following result: if a union does not want the existing contract, but only the right to bargain, and represents a majority of employees, it may abandon the contract and institute unfair labor practice charges before the National Labor Relations Board for a bargaining order. Conversely, if the union wants the labor contract, and does not represent a majority of the employees, it can sue in federal district court for arbitration and seek enforcement of the agreement and employment of its members. Furthermore, if the union knows that it cannot achieve recognition through a §158 (a)(5) unfair labor practice charge because the employer is not a successor employer as defined by the NLRB, the union will simply circumvent the NLRB by pursuing a §185 action through the courts in the hopes that the new employer will be compelled to arbitrate. The possible result of such arbitration is that the employer will not only be forced to recognize the union but be bound by the contract or parts thereof. Such forum-shopping is in derogation of the principle established by this Court in *Textile Workers Union* v *Lincoln Mills, supra.*[14] The need for a ruling by this Court on the precise issue of the nature of successorship in the twin contexts of §185 *(Wiley)* and §158 *(Burns)* is essential for the development of a uniform federal labor law. Moreover, it is essential that this Court clearly rule on the impact of its *Burns* decision on cases arising under §185 of the Act.

III. The Decision of the Sixth Circuit Court of Appeals is in Conflict with All Applicable Decisions of Other Circuits on the Issue of Successorship.

There is at present a clear conflict between the decision in this case and the position adopted by several United States Courts of Appeal. In *NLRB* v *John Stepp's Friendly Ford, Inc.*, 338 F2d 833 (9th Cir. 1964), the Ninth Circuit Court of Appeals reversed an NLRB finding of successorship where a majority of the em-

[14] In another context, see *Guaranty Trust Co.* v *York*, 326 US 99, 89 L Ed 2079, 65 S Ct 1464 (1945), where this Court stated: "The operation of a double system of conflicting laws. . .is plainly hostile to the reign of law." 326 US at 112.

ployer's work force was not composed of persons formerly employed by its predecessor.[15] The Court specifically ruled that the controlling question on the issue of successorship is whether the new owner may rationally be said, as to the unit in question, to have taken over and succeeded to his predecessor's employees. In resolving this question, the Ninth Circuit stated:

> "If he has not – if, on the contrary, he has within the unit in question secured his own employees – then he is not, as to the employees in question, a successor. He is their original employer. In such case both the employer and the employee unit are strangers to the certification and to the election upon which it was based. Nothing remains of the relationship to which the certification attached." 338 F2d at 836.

Subsequent to *John Stepp's Friendly Ford*, the NLRB expressly adopted the Ninth Circuit's approach.[16]

The Fifth Circuit has also expressly adopted the Ninth Circuit's approach. In *NLRB* v *Seafarers Union*, 422 F2d 59 (5th Cir. 1970), the Fifth Circuit quoted the above passage from *John Stepp's Friendly Ford* with favor, and held that there must be majority status before a new owner can be deemed a successor.[17]

Similarly, in *NLRB* v *Bachrodt Chevrolet Co.*, 468 F2d 963, 967 (7th Cir. 1972), the Seventh Circuit Court of Appeals predicated its determination of successorship on the fact that the new owner hired "over twenty-two of the twenty-four employees in the bargaining unit". It should be noted that this Court vacated the Circuit's decision with instructions to remand the case to the NLRB for reconsideration in light of *Burns*. See 411 US____, 36 L Ed 2d 304, 93 S Ct 1547 (1973). On remand, the NLRB affirmed successorship, largely on the basis that the employer had taken its predecessor's labor force. *Bachrodt Chevrolet Co.*, 205 NLRB No. 122 (1973).

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[15] See also *Wackenhut Corporation* v *International Union, United Plant Guard Workers of America*, 332 F2d 954 (9th Cir. 1964), wherein the Court of Appeals for the Ninth Circuit held that for successorship to exist, a majority of the predecessor's employees must be employed.

[16] See *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968); *Federal Electric Corp.*, 167 NLRB No. 63 (1968).

[17] See also *NLRB* v *Alamo White Truck Service*, 273 F2d 238 (5th Cir. 1959).

Additionally, the Eighth Circuit, in *NLRB* v *Polytech, Inc.*, 469 F2d 1226, (8th Cir. 1972), adopted this Court's *Burns* rationale to determine successorship:

> "At the time of the Union's request for recognition, Polytech, Inc. had 7 production employees, 4 of whom were formerly employed by Polytech Company. *Under Burns it is the number of new employees and whether they are a majority that is important* . . . Furthermore, where a majority of the new employees are employed by the predecessor, this has been held to constitute a retention of employee identity." (Emphasis added) 469 F2d at 1230.

Clearly, the Eighth Circuit Court of Appeals rationale as reflected in *Polytech* is specifically at variance with the Sixth Circuit Court of Appeals' decision in the instant case.

The Sixth Circuit Court of Appeals in its opinion discusses *Monroe Sander Corporation* v *Livingston*, 377 F2d 6 (2nd Cir. 1967) in the context of its holding on successorship. The Sixth Circuit properly characterized *Monroe Sander* as the only § 185 action where successorship was found absent a finding that the new employer hired a majority of employees. *Monroe Sander*, however, is clearly not applicable, and it is noteworthy that the Court of Appeals, in its holding on successorship, did not cite *Monroe Sander*, nor any other authority.

Monroe Sander, in essence, involved a single employing enterprise, American Petrochemical Corporation ("Petrochemical"), which manufactured paints, lacquers, varnish and enamels through Monroe Sander, a wholly-owned subsidiary. Monroe Sander had a labor agreement. Petrochemical decided to close the Monroe Sander plant and transfer the operations to the plant of a new subsidiary. The Union brought a § 185 action to compel arbitration, which was granted. Thus, *Monroe Sander* involved the obligations of interrelated companies and *not* the obligation of an independent purchaser of assets such as Petitioner. The Second Circuit cited this distinguishing factor and its importance in *Printing Specialties & Paper Products Union No. 447, International Printing Pressmen and Assistants Union of N.A., AFL-CIO* v *Pride Papers Aaronson Bros. Paper Corporation*, 445 F2d 361, 364 (2nd Cir. 1971), wherein the Court declined to find successorship or to impose the collective bargaining agreement upon an "unwilling party who had no part in the negotiation of the agreement".

In footnote 1 of its *Printing Specialties* opinion, the Second Circuit, commenting on *its own decision* in *Monroe Sander*, stated:

> "In *Monroe Sander Corp.* v *Livingston* (Citation omitted), we found a successorship although none of the former employees were hired by the successor corporation. In that case, however, continuity was evidenced by many factors, *not the least of which was the fact that the transaction involved a parent corporation's termination of one subsidiary plant and the purchase of another.*" (Emphasis added)

See also, *Owens-Illinois, Inc.* v *District 65, Retail, Wholesale, and Department Store Union, AFL-CIO*, 276 F Supp 740 (S.D.N.Y. 1967); aff'd 393 F2d 932 (2nd Cir. 1968).

The essential issue in *Monroe Sander* was whether Petrochemical and its subsidiary Monroe Sander, *parties to the collective bargaining agreement in question*, should be required to arbitrate – not whether the purchaser of assets of an unrelated corporation is bound to arbitrate under the latter's collective bargaining agreement. Petitioner submits that *Monroe Sander* is so factually distinguishable that it does not constitute legal authority in the present case.

With the exception of *Monroe Sander*, every §185 case decided by a Court of Appeals in which arbitration was ordered involved a new employer whose labor force contained a "majority of employees."[18] Especially relevant here is *Boeing Co.* v *International Association of Machinists and Aerospace Workers, AFL – CIO*, 351 F Supp 813 (M.D. Fla. 1972), currently on appeal to the Fifth Circuit. In *Boeing*, a §185 case wherein the alleged "successor" did not hire a "majority of employees," the District Court held as follows:

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[18] See *Wackenhut Corporation* v *International Union, United Plant Guard Workers of America*, 332 F2d 954 (9th Cir. 1964); *United Steelworkers of America* v *Reliance Universal Inc.*, 335 F2d 891 (3rd Cir. 1964); *United States Gypsum Co.* v *United Steelworkers of America*, 384 F2d 38 (5th Cir. 1967); cert. denied 389 US 1042, 19 L Ed 2d 832, 88 S Ct 783 (1968); *Printing Specialties & Paper Products Union No. 447, International Printing Pressmen and Assistants Union of N.A., AFL-CIO* v *Pride Papers Aaronson Bros. Paper Corporation*, 445 F2d 361 (2nd Cir. 1971); cert. denied 404 US 1001, 30 L Ed 2d 553, 92 S Ct 564 (1971)

> "*Burns* held that Burns had the duty to bargain with the Union with which Wackenhut had had a collective bargaining agreement but that it (Burns) was not bound by the terms of the contract. That holding appears to have been based on finding Burns the successor to Wackenhut *as a result of employing a majority of Wackenhut employees.* In the case at bar Boeing did not meet that standard of successorship and this Court holds therefore that it was not a successor to TWA." (Emphasis added) 351 F Supp at 816.

Additionally, in every NLRB determination reviewed by a Court of Appeals which involved successorship, the Court has upheld a bargaining order only where the new employer employed a majority of employees or there was a finding that the new employer's refusal to employ such persons was discriminatory.[19] In no case, except the Sixth Circuit's decision herein, has a Court of Appeals ordered a new employer, who has not taken a "majority of employees" or who has not discriminatorily refused to employ the predecessor's employees, either to arbitrate under § 185 or bargain under § 158 (a) (5) of the Act.

IV. The Decision of the Sixth Circuit Court of Appeals on Successorship Contravenes Well-Established NLRB Authority

The decisions of the District Court and the Court of Appeals for the Sixth Circuit are clearly contrary to the successorship doc-

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[19] See *Overnite Transportation Co.* v *NLRB*, 372 F2d 765 (4th Cir. 1967); *NLRB* v *Zayre Corp.*, 424 F2d 1159 (5th Cir. 1970); *Emerald Maintenance, Inc.* v *NLRB*, 464 F2d 698 (5th Cir. 1972); *NLRB* v *Wayne Convalescent Center, Inc.*, 465 F2d 1039 (6th Cir. 1972); *Spitzer Akron, Inc.* v *NLRB*, 470 F2d 1000 (6th Cir. 1972); vac'd and rem'd ___US___, 36 L Ed 2d 955, 93 S Ct___ (1973); *Tom-A-Hawk Transit, Inc.* v *NLRB*, 419 F2d 1025 (7th Cir. 1969); *International Union, Progressive Mine Workers of America* v *NLRB*, 319 F2d 428 (7th Cir. 1963); rev'd on other grounds, 375 US 396, 11 L Ed 2d 412, 84 S Ct 453 (1964); *United States Gypsum Co.* v *NLRB*, ___ F2d ___, 84 LRRM 2129 (8th Cir. 1973); *NLRB* v *Denham*, 469 F2d 239 (9th Cir. 1972); vac'd and rem'd 411 US___, 36 L Ed 2d 407, 93 S Ct 1925 (1973); *NLRB* v *Geronimo Service Co.*, 467 F2d 903 (10th Cir. 1972); *Ranch-Way Inc.* v *NLRB*, 445 F2d 625 (10th Cir. 1971); vac'd and rem'd 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973)

trine adopted and applied by the NLRB. Although the NLRB generally considers factors other than employee complement in successorship cases, *in practice* its decisions are controlled by whether the new employer had hired a majority of employees,[20] unless there has been a discriminatory refusal to hire.[21] There are only two exceptions to this proposition, neither of which detracts from its validity. In *John Stepp's Friendly Ford*, 141 NLRB 1965 (1963), the NLRB was promptly reversed by the Ninth Circuit because the new employer did not take a majority of the former

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[20] *Bachrodt Chevrolet Co.*, 186 NLRB No. 151 (1970); enforced in part 468 F2d 963 (7th Cir. 1972); vac'd & rem'd 411 US ___, 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973); *Ranch-Way Inc.*, 183 NLRB No. 116 (1970); enforced 445 F2d 625 (10th Cir. 1971); vac'd & rem'd 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973); *B & W Maintenance Service*, 203 NLRB No. 101 (1973); *Eklund's Sweden House Inn*, 203 NLRB No. 56 (1973); *Good Foods Manufacturing and Processing Corp.*, 195 NLRB No. 83 (1972); reconsidered 200 NLRB No. 86 (1972); *S - H Food Service, Inc.*, 183 NLRB No. 124 (1970); reconsidered 199 NLRB No. 4 (1972); *Hecker Machine, Inc.*, 198 NLRB No. 161 (1972); *Howard Johnson Co.*, 198 NLRB No. 98 (1972); *Alliance Industries, Inc.*, 198 NLRB No. 97 (1972); *Milwaukee Engine & Equipment Corp.*, 198 NLRB No. 56 (1972); *C. G. Conn. Ltd.*, 197 NLRB No. 84 (1972); enforced 474 F2d 1344 (5th Cir. 1973); *Westgate Corp.*, 196 NLRB No. 54 (1972); *Penn Bldg. Maintenance Corp.*, 195 NLRB No. 29 (1972); *Spitzer Akron, Inc.*, 195 NLRB No. 24 (1972); enforced 470 F2d 1000 (6th Cir. 1972); vac'd & rem'd ___ US ___, 36 L Ed 2d 955, 93 S Ct ___ (1973); *Eastland Lanes*, 194 NLRB No. 149 (1972); *Spruce Up Corp.*, 194 NLRB No. 145 (1972); *G. T. & E. Data Services Corp.*, 194 NLRB No. 102 (1971); *Geronimo Service Co.*, 191 NLRB No. 88 (1971); enforced 467 F2d 903 (10th Cir. 1972); *Columbia Marine Service, Inc.*, 191 NLRB No. 20 (1971); *Emerald Maintenance, Inc.*, 188 NLRB No. 139 (1971); enforced in part 464 F2d 698 (5th Cir. 1972); *Denham Co.*, 187 NLRB No. 53 (1970); modified 469 F2d 239 (9th Cir. 1972); vac'd & rem'd 411 US ___, 36 L Ed 2d 407, 93 S Ct ___ (1973); *Marion Simcox*, 178 NLRB No. 85 (1969); *Michaud Bus Lines, Inc.*, 171 NLRB No. 21 (1968); *S.S. Kresge Co.*, 169 NLRB No. 61 (1968); *Ugite Gas Inc.*, 126 NLRB No. 65 (1960); *Brockelman Bros.*, 122 NLRB No. 104 (1959).

[21] *Foodway of El Paso*, 201 NLRB No. 140 (1970); *Servico*, 191 NLRB No. 125 (1971); *Traginew Inc.*, 185 NLRB No. 132 (1970); modified 470 F2d 669 (9th Cir. 1972).

employer's employees.[22] As indicated above, the NLRB has subsequently cited with approval the Ninth Circuit's decision. The only other case in which the NLRB found successorship without the requisite majority of employees is *Firchau Logging Co.*, 126 NLRB No. 149 (1960). *Firchau* was decided prior to *NLRB* v *John Stepp's Friendly Ford, Inc.* and, therefore, does not constitute viable authority. Moreover, it should be noted that even though a majority of the new labor work force was not employed by the predecessor, the union claimed it had authorization cards signed by a majority of employees in the new work force.

To underscore the importance of the NLRB's majority test, the NLRB has on several occasions refused to find successorship when such a majority was not present although most of the other criteria enunciated by the Board were present.[23] Of these cases, *Builders Realty & Mortgage Co., Inc. d/b/a Ramada Inn*, 186 NLRB No. 87 (1970), is worthy of particular consideration in light of the similarity between that fact situation and the instant case. In *Builders Realty*, the NLRB held that an employer, which reopened a restaurant abandoned by another company to which it previously had leased the restaurant, did not violate Section 158(a) (5) of the Labor Management Relations Action when it refused to bargain with the union representing the former owner's employees. The NLRB made this determination even though following the reopening the new employer operated the restaurant at the same location with the same fixtures and equipment, served the same type of food and beverages in essentially the same way,

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[22] *NLRB* v *John Stepp's Friendly Ford, Inc.*, 338 F2d 833 (9th Cir. 1964).

[23] See, e.g., *Dorrance J. Benzchawel, d/b/a Parkwood IGA*, 201 NLRB No. 141 (1973); *Crotona Service Corp.*, 200 NLRB No. 97 (1972); *Triangle Maintenance Corp.*, 194 NLRB No. 85 (1971); *Southline System Services, Inc.*, 198 NLRB No. 71 (1972); *Builders Realty & Mortgage Co., Inc. d/b/a Ramada Inn*, 186 NLRB No. 87 (1970); *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968); *Thomas Cadillac, Inc.*, 170 NLRB No. 92 (1968), aff'd 414 F2d 1135 (D.C. Cir. 1969); *Federal Electric Corp.*, 167 NLRB No. 63 (1968); *Triumph Sales, Inc.*, 154 NLRB No. 71 (1965).

operated under the same franchise and employed essentially the same classifications of employees. The NLRB found no successorship since it appeared that a majority of the other company's employees were not hired by the new employer as part of its regular and expanded work force, and that the employer's failure to hire a majority of the other company's employees was not due to discriminatory reasons.

Clearly this Court in *Textile Workers Union* v *Lincoln Mills, supra,* foreclosed the development of two different federal interpretations of federal law and provided that the federal substantive law to be applied is to be uniform and in the first instance based on the law as developed under the Labor Management Relations Act. The NLRB, exercising its authority under that Act, has enunciated controlling federal substantive law on the issue of successorship. Yet, as a review of the NLRB's decisions clearly indicates, the Sixth Circuit has abandoned that law, "at least in this § 301 action,"[24] and finds successorship where in fact under NLRB decisions successorship would not exist. Such a dichotomy cannot be permitted to exist in federal labor law.[25]

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[24] Appx A, p. 7a. This comment by the Sixth Circuit certainly indicates that it would apply different standards per successorship if the instant case were on review from a decision of the NLRB rather than on review from the District Court. It is precisely this newly-created practice of applying different standards to exactly the same case depending upon choice of forum which the Petitioner strongly urges requires this Court to grant this Petition. Choice of forum simply cannot be allowed to result in parallel bodies of federal labor law at odds with each other.

[25] See *Local 174, Teamsters Union* v *Lucas Flour Co.*, 369 US 95, 7 L Ed 2d 593, 82 S Ct 571 (1961); *San Diego Bldg. Trades Council* v *Garmon*, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a Writ of Certiorari should be granted.

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APPENDIX A

No. 72-2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Detroit Local Joint Executive Board, Hotel and Restaurant Employes and Bartenders International Union, AFL-CIO, ***Plaintiff-Appellee,*** **v.** **Howard Johnson Company, Inc.,** ***Defendant-Appellant.***	**Appeal from the United States District Court for the Eastern District of Michigan**

Decided and Filed July 12, 1973.

Before: Phillips, Chief Judge, Celebrezze and Miller, Circuit Judges.

Miller, Circuit Judge. The Plaintiff, Detroit Local Executive Board, filed this action under §301 of the Labor Management Relations Act, 29 U.S.C. §185,[1] seeking to require the defendant, Howard Johnson Company, Inc., to arbitrate grievances that arose during its take-over of a motel and restaurant formerly owned by P.L. Grissom & Son, Inc., and the Belleville Restaurant Company.

On December 7, 1959, the defendant and P.L. Grissom & Son, Inc., entered into a license agreement providing for the operation of a "Howard Johnson Motor Lodge" in Belleville, Michigan. On August 18, 1960, the defendant entered into an operator's agreement with Ben Bibb, P.L. Grissom, and the Belleville Restaurant Company for the operation of a "Howard Johnson's Restaurant" adjacent to the motor lodge. On January 1, 1968, the Belleville Restaurant Company and the Hotel & Restaurant Employees

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[1] Section 301 of the L.M.R.A., 29 U.S.C. §185, provides for action in federal courts by either party to enforce the provisions of a collective bargaining agreement.

& Bartenders International Union entered into a collective bargaining contract affecting the restaurant employees. On August 1, 1968, P.L. Grissom & Son, Inc., the operator of the motor lodge, entered into a collective bargaining agreement with the Hotel, Motel and Restaurant Employees Union, Local 705, concerning the motel employees. On June 16, 1972, P.L. Grissom & Son, Inc., Charles Grissom, and the Belleville Restaurant Company[2] sold their interest in the motor lodge and the restaurant to the Howard Johnson Company, Inc. Pursuant to an oral agreement, the transfer date was set for July 24, 1972. On June 28, 1972, Howard Johnson notified Grissoms that it would not recognize or assume any labor agreements entered into by these companies. Also Howard Johnson would not assume any obligations or liabilities of the companies resulting from any labor agreements or from unfair labor practices. On July 9, 1972, Grissoms gave notice to their employees that their employment would be terminated at midnight July 23, 1972. On July 13, 1972, registered mail notices were sent to the union[3] notifying it of the termination of the business. Howard Johnson began interviewing prospective employees on July 10, 1972, and the first employees were hired on July 18, 1972. When Howard Johnson took over the operation of the motel and restaurant, it retained only nine of the restaurant's employees and only one of the motels employees. At least 40 employees were permanently replaced.

On July 21, 1972, the plaintiff union instituted this action in state court and obtained a temporary injunction prohibiting Howard Johnson from locking out or terminating the employment of the 40 employees. The company did not honor the injunction, claiming that it did not receive adequate service and notice. A hearing was held at the state court level at which the injunction was dissolved, pending a further pretrial hearing. The defendant filed a petition for removal and the state court pretrial hearing as such was never held. A hearing was held in federal district court on August 7, 1972, at which time the parties orally agreed on a stip-

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[2] For convenience the prior owners of both the restaurant and the motor lodge will hereafter be referred to as the Grissoms.

[3] While the unions named in the two agreements bear distinct names they are apparently identical in interest and governance and will be referred to herein and considered as one.

ulation of facts. On August 22, 1972, the district court entered its memorandum, finding for the plaintiff.[4] Notice of appeal was duly filed and the district court granted a stay pending appeal.

The collective bargaining agreement in effect between the motor lodge and the union contained the usual arbitration provisions. The grievance procedures were in four steps, the fourth step being submission of the grievance to an arbitrator.[5] The arbitration provision provided:

> **Section 2.** An arbitrator shall not have any right or authority to add to, substract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be subject matter of any grievance or arbitration procedure.

The agreement also provided:

> "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law or by merger or consolidation with another company provided the establishment remains in the same line of business."

Apparently neither agreement[6] attempted to delineate specifically which types of disputes were arbitrable.

The district court examined in close detail the two leading cases of the Supreme Court applicable to this action, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The district court concluded that *Wiley* was more in point than *Burns* and

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[4] The Grissoms apparently have expressed their willingness to settle or arbitrate any liability they might have under the collective bargaining agreements.

[5] The collective bargaining agreement between the restaurant and the union contained a similar grievance procedure, but only in three steps.

[6] The restaurant-union agreement although it contained an arbitration clause did not include either of the above-quoted provisions.

consequently that the defendant should be required to arbitrate.[7] This finding was premised on the conclusion that Howard Johnson was a successor employer, and therefore, under *Wiley* should be required to honor the arbitration clause of the Grissoms' collective bargaining agreements with the union. The district court left to the arbitrator the decision as to which provisions of the agreements should be applicable to Howard Johnson.

The first question we must face is whether Howard Johnson is a successor employer. The Court in *Wiley* said:

> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. 376 U.S. at 551.

In *Burns* the Court cited with approval a number of court decisions enforcing orders of the NLRB delineating a number of factors to consider in determining whether there is a "continuity of interest" so that the purchaser of a business is a successor. These factors include: the prior and subsequent structure of the business operation, *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1163 (5th Cir. 1970); *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225 (6th Cir. 1969), the location of the operation, *NLRB* v. *Zayre, supra; S. S. Kresge* v. *NLRB,supra; NLRB* v. *McFarland*, 306 F.2d 219 (10th Cir. 1962), and the identity of the employees and the nature of the work, *NLRB* v. *Zayre, supra, Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025 (7th Cir. 1969).[8]

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[7] In *Wiley* the Court required the surviving corporation, after a merger, to arbitrate grievances under the arbitration provisions contained in the collective bargaining agreement negotiated by the union with the displaced corporation.

In *Burns* the Court held that a successor although required to bargain with the union if it retained a majority of the predecessor's employees, need not honor the previously negotiated collective bargaining agreement. (emphasis added)

[8] This list of considerations is not intended to be exhaustive. Since each case must be considered on its own facts, other factors could be considered in appropriate circumstances.

Howard Johnson argues that the controlling factor in all successorship cases is whether the new owner hired a majority of the old owner's employees. For support it points to the Court's language in *Burns*.

> It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period *if a majority of employees after the change of ownership or management were employed by the preceding employer.* 406 U.S. at 279 (emphasis added).

Also:

> But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of §8(a) (5) and §9(a) by ordering the employer to bargain with the incumbent union. 406 U.S. at 281.

Moreover, Howard Johnson points to this court's decisions in *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269 (6th Cir. 1971) and *NLRB* v. *Wayne Convalescent Home*, 465 F.2d 1039 (6th Cir. 1972). Both of these decisions placed great reliance on the hiring of enough of the predecessor's employees to constitute a majority of the successor's work force in finding successorship status. On the other hand, the absence of the hiring of a majority of the predecessor's employees may lead to the refusal to find successorship status. *See NLRB* v. *John Stepp's Friendly Ford, Inc.*, 338 F.2d 833 (9th Cir. 1964). Apparently the same considerations apply to actions under §301 of the LMRA. In *Wackenhut Corp.* v. *International Union, United Plant Guards*, 332 F.2d 954 (9th Cir. 1964), the Ninth Circuit placed major reliance on the hiring of substantially all of the predecessor's employees to find successorship status. The Court there also followed *Wiley* and required the successor employer to abide by the substantive terms of the collective bargaining agreements as determined by an arbitrator. In *Printing Specialties & Paper Products Union* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361 (2nd Cir. 1971), the Second Circuit

regused to find successorship in an action under §301. The Court stated: "The fact that no [predecessor's] employees worked at the new enterprise is most compelling evidence of lack of substantial continuity in the business enterprise." 445 F.2d at 363-4. Only one case has been brought to our attention finding successorship in a §301 action where the successor did not hire a majority of the predecessor's employees. In *Monroe Sanders Corp.* v. *Livingston*, 377 F.2d 6 (2nd Cir. 1967), the Second Circuit held that where a parent company terminated the employees of a subsidiary in order to continue the same functions at a newly purchased operation, the parent could be required to arbitrate, as a successor, the termination of the subsidiary's employees.

In the case before us, the district court held that although Howard Johnson did not hire a majority of Grissoms' employees, it could nevertheless be required to arbitrate as a successor. The court found considerable continuity of interest between the new and old business. It pointed out that substantially all of the assets of Grissoms were purchased, that the location and identity of the businesses remained exactly the same, that there was only a one minute hiatus in the operation of the enterprises at the time of the transfer, and that many of the products and services were identical. Relying on these factors the district court viewed Howard Johnson as a successor. We agree with this conclusion.

In addition to the criteria relied upon by the district court, the franchising agreements between Grissoms and Howard Johnson included extensive reservations by Howard Johnson over the operation of the motel and the restaurant, evidencing the close control it possessed over the management and activities of both operations. Also the motel bargaining agreement itself contained a successorship clause.[9]

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[9] This clause does not indicate an intention on the part of Howard Johnson to be bound by the collective bargaining agreement since it was not a party to the agreement, but it does indicate the intention of the union to have the collective bargaining agreement continue in effect after a change in ownership.

Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, at least in this §301 action. Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees. Also to adopt the position urged by Howard Johnson would make the employees' jobs completely contingent on the employer's desire either to retain or to disregard the collective bargaining agreements. If Howard Johnson sought to retain the agreement negotiated by Grissoms, it would hire a majority of Grissoms' employees. If, on the other hand, it wished to disregard the collective bargaining agreement, it would simply hire none or at best only a few of the former employees. The decision whether to hire the predecessor's employees should turn upon other and more relevant considerations.[10]

Since we determine that Howard Johnson is a successor employer, we must decide whether such status carries with it the obligation to arbitrate under the collective bargaining agreements. In *Wiley* the Supreme Court held that collective bargaining agreements under federal labor law must be interpreted differently than other contracts as construed under common law principles. Accordingly, the Court held that the arbitration provisions are binding on a successor employer even though it was not a party to the collective bargaining agreement. Following *Wiley* several circuits have held that a successor employer in §301 actions could be bound by the substantive terms of the previously negotiated collective bargaining agreement if appropriate under the arbitrator's award. *See e.g., Wackenhut Corp.* v. *International Union, United*

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[10] Howard Johnson also argues that since this was a purchase and sale of assets, it is not a successor as it did not by operation of state law assume any of the obligations of the agreements. In *Wiley*, the transaction was a merger in which the surviving corporation is liable for the debts of the disappearing corporation. This distinction has been consistently rejected in §301 actions. *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967); *United Steelworkers of America* v. *Reliance Universal Inc.*, 335 F.2d 891 (3rd Cir. 1964); *Wackenhut Corp.* v. *International Union, United Plant Guards*, 332 F.2d 954 (9th Cir. 1964).

Plant Guards, supra; United States Gypsum Co. v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967); *Monroe Sanders Corp.* v. *Livingston, supra.*

Howard Johnson, however, argues that the Supreme Court's decision in *Burns* that a successor employer does not violate §8(a)(5) when it refuses to honor any of the substantive terms of the predecessor's collective bargaining agreement, also precludes an arbitrator from requiring a successor to honor any of the terms of the previous agreement. We do not feel that *Burns* requires such a result.

In *Wiley* the Court stated:

> that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees claims continue to be resolved by arbitration rather than by "the relative strength ... of the contending forces." *Warrior & Gulf, supra*, at 580. 376 U.S. at 549.

Nothing in *Burns* in our opinion alters this reflection of national policy. It is true that in *Burns* the Court said:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to

the relative economic strength of the parties. 406 U.S. at 287-288.

Furthermore, the Court criticized the Board's position that the successor is bound by all the terms of the collective bargaining agreement. It said:

> The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contracts and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. 406 U.S. at 288-89 (footnotes omitted).

At first glance this language appears to cast doubts on the continued validity of *Wiley*. We do not feel, however, that the Court intended to eviscerate *Wiley*. The two cases are not irreconcilable. In *Burns* the Supreme Court distinguished *Wiley* on three grounds. First, the Court noted that *Wiley* arose in the context of a Sec. 301 action for arbitration, while *Burns* arose in the context of a Sec. 8(a)(5) proceeding where the National Labor Relations Board is "expressly limited by the provisions of Sec. 8(d)."[11] 406 U.S. at 285. Second, the Court noted that *Wiley* was limited to an arbitration order while in *Burns* the Board found the company in violation of Sec. 8(a)(5) for refusing to bargain with the union in not honoring the substantive provisions of the collective bargaining agreement. Third, *Wiley* involved a merger occurring

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APPENDIX A footnotes

[11] Section 8(d), 29 U.S.C. Sec. 158(d), as interpreted by the Supreme Court in *H. K. Porter* v. *NLRB*, 397 U.S. 99 (1970) prohibits the NLRB from ordering a party to accede to a demand to incorporate a specific provision into a collective bargaining agreement.

against the background of state law, while in *Burns* the two companies were competitors and had no prior dealings.

The first and second distinctions presented by the Court are convincting that *Burns* does not preclude arbitration in the situation before us. Traditionally, arbitrators have been accorded wide flexibility in interpreting collective bargaining agreements. In *Wiley* the Court's limited holding was that the successor employer was under a duty to arbitrate grievances, the scope and extent of the duty being governed by the collective bargaining agreement. The Court avoided any expression of views as to the merits of the substantive matters of arbitration. Since *Wiley* arbitration awards have taken into account altered conditions created by a change of employers, although of course the arbitrator's authority must come from the collective bargaining agreement itself. As stated by the Third Circuit in *United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F.2d 891, 895 (3rd Cir. 1964):

> In any event, we find implicit in the guarded language of the Wiley opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances. Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract.

The NLRB in its Burns decision had adopted an all-or-nothing approach. If the employer was a successor then it was

required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). Apparently the Board felt that it was barred from taking a middle ground by requiring the successor to honor selective portions of the agreement by the Supreme Court's ruling in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. This factor we feel is primarily the Supreme Court's reason for rejection of the Board's position.[12] In arbitration proceedings as ordered below such rigidity is not present.

Also we feel that our holding is in accordance with the national policy of the settlement of labor disputes by arbitration rather than by a contest of strength between the parties. *See, United Steel Workers of America* v. *America Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). We do not feel that such a role was vitiated by *Burns*.[13]

Finally, we must note that nothing in our opinion should be taken as an expression on the merits of the respective complaints before the arbitrator. As stated by the Fifth Circuit in *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F.2d 238, 244 (5th Cir. 1961):

> We make doubly plain that this opinion in no way indicates what, if any, decision an arbitrator should or must

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[12] Even before the Supreme Court's ruling in *Burns* the National Labor Relations Board had retreated from this approach and found that "unusual circumstances" will present the imposition of the entire collective bargaining agreement where it would lead to inequitable results. *Emerald Maintenance Inc.*, 188 NLRB No. 139 (1971).

[13] The plaintiff suggests that the approach adopted in this case will make the employees' and the employer's rights contingent on the choice of forum. We do not disagree with this characterization, but feel that it follows from the first ground on which *Burns* distinguished *Wiley* – that the NLRB is expressly limited by Sec. 8(d) of the Act while an arbitrator is under no such restriction.

make. We hold merely that he should determine the grievance. Whether the decision or the remedy prescribed is, or is not, supportable is for another day.

In accordance with the foregoing the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, ***Plaintiffs,*** **vs. Howard Johnson Company, Inc., a Maryland corporation; Howard Johnson Motor Lodge, Inc., a Michigan corporation; and Belleville Restaurant Company, Inc., a Michigan corporation,** ***Defendants.***	**Civil Action No. 38654**

MEMORANDUM OPINION

Plaintiff union instituted suit in the Circuit Court of the 3rd Judicial Circuit of Michigan (Wayne County) for the purpose of obtaining an order of that court compelling the defendants to arbitrate under Section 301 of the National Labor Relations Act (29 U.S.C. § 185 (1970)) and for a mandatory injunction requiring defendants to rehire or reinstate certain members of plaintiff union previously employed at Howard Johnson Motor Lodge and the Belleville Restaurant located in Belleville, Michigan.

The parties hereto have stipulated to all facts pertinent to a decision on the merits and have jointly requested that, there being no dispute as to any material fact, the Court decide the issues presented. The stipulation of facts was placed on the record and is incorporated by reference herein in its entirety. For the purposes of clarity and continuity, a resume of those facts is set forth below in narrative form.

The Howard Johnson Motor Lodge and the Belleville Restaurant were owned and operated by two corporations controlled by

the Grissom family (hereinafter referred to as Grissom). Grissom operated these businesses under franchising agreements entered into with Howard Johnson Company, Inc., a Maryland corporation (hereinafter referred to as the Company), on December 12, 1959 and August 18, 1960.

The 1959 "License Agreement" involves the franchising of the Howard Johnson Motor Lodge and is a strikingly comprehensive and stringently controlling document; for example, the Agreement provides that the Company shall determine and approve standards of construction, operation and service; that Company supervisory shall have the right to enter the premises at any reasonable time for that purpose; that approval must be obtained for furniture, utensils, stationery, supplies, etc., bearing the "Howard Johnson" trade name; that repairs and painting will be done at the reasonable behest of the Company; that the licensee will not seek to employ any persons employed by another franchisee; that certain insurance is to be carried; that the licensee give the Company the first option to purchase in the event of a contemplated sale and in the event the Company declines to purchase, the successor must be approved by the Company.

The restaurant "Operator's Agreement" is of identical import with the added feature of the requirement that the franchisee purchase from the Company all supplies or products manufactured or sold by the Company which the franchisee may need for use or sale at the restaurant.

In pursuance of said agreements, Grissom operated the Motor Lodge and Restaurant and entered into collective bargaining agreements (Exhibits A, B & C attached to complaint) with the plaintiff union as the certified representative of employees at both businesses. These agreements provide, among other things, that grievances shall be resolved by Arbitration (Exhibit A, Article IX, Exhibit B, Article III) and that the agreements shall be binding upon the "successors, assigns, purchasers, or transferees" of Grissom (Exhibit A, Article XVIII, as to Motor Lodge employees.)

Subsequently, Grissom entered into negotiations for the sale, transfer and lease of its holdings in the two businesses to the Howard Johnson Company and on June 16, 1972, an Agreement

was executed by the respective parties which called for an effective cessation date and time of July 23, 1972, at 11:59 P.M. That is, that the Company would assume the operation of both businesses pursuant to the Agreement, as of 12:01 A.M., July 24, 1972.

On June 28, 1972, the Company mailed to Grissom an amenatory letter which provided that the Company would not recognize and assume any labor agreements then extant. Grissom signed an acknowledgement and confirmation on July 11, 1972.

On July 9, 1972, Notices to Employees of both businesses were posted advising of the termination of employment as of Midnight, July 23, 1972. Some personal contact between the Company and the Union commenced on July 11, 1972. On July 13, 1972, registered mail notices were sent to plaintiff union advising of the termination of business by Grissom at the aforesaid date and time.

The Company began interviewing prospective employees on July 10, 1972, and hired the first employee on July 18, 1972. It commenced training of employees on July 20, 1972, at another location.

The Company commenced operation at both businesses at 12:01 A.M., July 24, 1972 with 55 employees; of those 33 were engaged in the Restaurant and 9 of them were former Grissom employees. None of the supervisory personnel of Grissom were retained by the Company. The number employed by Grissom at the time of the changeover was 53.

On the afternoon of Friday, July 21, 1972, plaintiff union instituted this lawsuit in the State court and obtained an order which enjoined the defendants from locking out or terminating the employment of the 53 Grissom employees. Defendants did not honor the injunction, claiming that appropriate notice and service was not made.

On July 24, 1972, a hearing was held before the Honorable Blair Moody, Jr., Circuit Judge for Wayne County, and Judge Moody dissolved the injunction pending a pre-trial hearing to be held on July 28, 1972.

On July 26, 1972, defendants filed a Petition for Removal to this Court and the July 28, 1972 pre-trial hearing was not held per se, but a transcript of the proceedings at that time has been submitted.

As has been indicated, the above represents only a resume of material facts since it is not necessary, in view of the stipulation of the parties to enumerate the salient facts in detail.

Defendants Grissom have stipulated and agreed to arbitrate in accordance with the terms of the collective bargaining agreement and are not, therefore, indispensably involved in the issues now presented.

These issues are as follows:

1. Should the Howard Johnson Company be compelled to arbitrate under the provisions of the collective bargaining agreement entered into between Grissom and the plaintiff union?

2. Should a preliminary injunction issue requiring that the Howard Johnson Company rehire all of the former Grissom employees forthwith?

3. Should this Court remand the proceeding to the State Court.

It is, of course, obvious that decision of this issue must rest on the understanding and applications of the principles and directions of two key cases: *John Wiley & Sons* v. *Livingston* 376 U.S. 543 (1964) and *NLRB* v. *Burns International Security Services, Inc.*, 40 U.S.L.W. 4499 (U.S. May 15, 1972).

No more frequent admonition appears in the pages of appellate decisions then that each case must be determined on the facts and circumstances peculiar to it. This prompts a thorough analysis of the factual situations in *Wiley* and *Burns.*

Wiley was, in the first instance, a Section 301 case wherein the union sought to compel the Wiley company to arbitrate. It contained these significant features: Interscience Publishers, a smaller firm, merged with and into Wiley, another publishing firm.

Interscience had a current collective bargaining agreement containing an arbitration clause with the union. Wiley's employees were not represented by any union. There was no express provision in the Interscience-Union agreement making the agreement binding on the successors of Interscience. Most of the Interscience employees were retained by the merged corporation.

In *Wiley*, the Supreme Court, through Mr. Justice Harlan, framed the issue, thusly:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision."

The Court then held as follows:

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not *automatically* terminate all rights of the employees covered by the agreement, and that, in *appropriate circumstances, present here*, the successor employer may be required to arbitrate with the union under the agreement." (376 U.S. at 548) (Emphases added.)

The "appropriate circumstances" mentioned by the Court must entail the factors set forth above with the added feature of the Court's reference to the general rule in corporation law relating to the survival of debts in merger cases (pg. 550 n. 3) and the references to Section 90 of the New York Stock Corporation Law (pg. 547-548).

The pervading principle enunciated by the Court and applied to those facts is contained succinctly in the following language:

> "It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into

another by merger, as in those in which one owner replaces another but the business entity remains the same." 376 U.S. at 549.

The parameters of the *Wiley* case are somewhat defined in *Burns* and an analysis of *Burns* is essential here.

Wackenhut provided protection services at a Lockheed plant and its employees were represented by a union which had negotiated a collective bargaining agreement with Wackenhut. However, *Burns* underbid Wachenhut for the protection services contract and employed 42 guards for that purpose, 27 of them having been previously employed by Wackenhut. Burns did not purchase any assets of Wackenhut? as a matter of fact, Burns had no dealing with Wackenhut whatsoever.

The N.L.R.B. found that Burns violated §§8(a)(5) and 8(a)(1) of the National Labor Relations Act by failing to recognize and bargain with the union and by refusing to honor the collective bargaining agreement, and ordered Burns to abide by the terms of that agreement. The Supreme Court held that under "the precise facts" therein involved, the N.L.R.B. erred in requiring Burns to honor the terms of the collective bargaining agreement but not in its order that Burns bargain with the union.

The Court's holding is couched thusly:

"... But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of §8(a)(5) and §9(a) by ordering the employer to *bargain* with the incumbent union ..."

"... It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and *to which Burns had in no way agreed.*" 40 U.S.L.W. 4502. (emphasis supplied.)

The Court then goes on to cite the misapplication by the Board of the *Wiley* case to the *Burns* factual situation:

"We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized 'the preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of national labor law,' survived the merger and *left to arbitration, subject to judicial review, the utlimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract . . .*" 40 U.S.L.W. 4503. (emphasis supplied.)

Further distinguishing *Burns* from *Wiley* the Court said:

" . . . The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate . . . *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law which embodies the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation . . ." 40 U.S.L.W. at 4503.

The concurring and dissenting opinion authored by Mr. Justice Rehnquist (joined by the Chief Justice, Justice Brennan and Justice Powell) provides further insight particularly with respect to the doctrine of "successorship" and its *Wiley* application. Particularly pertinent here is the following:

"*Wiley, supra,* speaks in terms of change in the 'ownership or structure of an enterprise' as bringing into play the obligation of the successor employer to perform an obligation voluntarily undertaken by the predecessor employer. But while the principle enumerated in *Wiley* is by no means limited to the corporate merger situation there, it cannot logically be extended to a mere naked shifting of a group of employees from one employer to another without totalling [sic] disregarding the basis for the doctrine . . ."

"Phrased another way, the doctrine of successorship in the federal common law of labor relations accords to employees

> the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to non labor-related claimants against the same entity. Non labor-related claimants in such transfer situations may be protected not only by assumption agreements resulting from the self-interest of the contracting parties participating in a merger or sale of assets but by state laws imposing upon the successor corporation any merger the obligations of the merged corporation (see e.g., § 90 of the New York Stock Corporation Law, cited in *Wiley, supra),* and by bulk sales acts found in numerous states. Those latter are designed to give the non labor-related creditor of the predecessor entity some claim, either as a matter of contract right against the successor, or as a matter of property right to charge the assets which pass from the predecessor to the successor. The implication of *Wiley* is that the federal common law of labor relations accords the same general type and degree of protection to employees claiming under a collective-bargaining contract." 40 U.S.L.W. at 4509.

The foregoing analysis, with the particular emphasis on the respective factual situations and the distinctions drawn between *Wiley* and *Burns,* leads this Court to the conclusion that the case at bar more closely approximates *Wiley* than *Burns* and that *Wiley* controls.

Certainly there is no *merger* in this case, but *Wiley* although dealing with a merger case did not limit the application of the successor doctrine to mergers:

> ". . . [T]his is so as much in cases like the present . . . as in those in which one owner replaces another but the business entity remains the same." 376 U.S. at 549.

Moreover, in this case, there is not the usual "arms length, willing seller, willing buyer" situation but one involve the take-over by a franchiser under licensing and operating agreements that evidence a control of large and invidious proportions.

Also in *Wiley* (as underlined by *Burns)* there was a state law background regarding merged corporations and a successor's

responsibility not unlike the Michigan background in respect to successor's obligations (MCLA Sec. 440.6101 - 440.6111 (1967). These provisions replaced MCLA 442.1 - 442.53 (1961)). Here, too, there is not only the purchase of assets, but in addition, the assumpation of certain outstanding contracts of Grissom (Page 9, Section XV of Sales Agreement).

Perhaps most importantly is the collective bargaining agreement itself (Exhibit A relating to Lodge employees) which specially contemplates that successors are bound by its terms. (See *Ranch-Way, Inc.* v. *NLRB*, 445 F.2d 625 (10th Cir. 1971); *International Association* v. *Northeast Airlines, Inc.*, 337 F. Supp. 499, 504 (D. Mass. 1972)). That the Company had notice of that agreement is obvious from its aforementioned addendum or modification of the Sales Agreement evidenced by the letter of June 28, 1972, which specifically repudiated any "labor agreements" then in force between Grissom and any labor organization.

It would appear, then, that the principle of *Wiley* that there be a ". . . substantial continuity of identity in the business before and after the change . . ." is amply satisfied here where substantially all of the assets of Grissom were purchased, the location and identification of the business remained exactly the same, there was a one-minute hiatus in the identical operation, and where even many products sold remained the same. Joined as this "continuity of identity" is with the enumerated features above, as contrasted with the *Burns* situation, the duty to arbitrate is clear.

The scope of an order to arbitrate should, however, be clearly understood in the terms of the role of this Court and certain reservations should be articulated.

It is noted, for example, that *Wiley* involved the claims of the union on behalf of those of its members hired by the successor. In *Burns* the duty to bargain was based, in part, on the hiring by the successor of a majority of predecessors' employees but the Court refused to order the successor to honor the predecessors' contract.

Thus, in *Burns*:

"We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive

terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions which must be honored do not correspond to the relative economic strength of the parties.

"The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor." 40 U.S.L.W. at 4505.

Thus, this order to arbitrate does not contemplate that it be tantamount to an order that the Company honor the collective bargaining agreement. Rather, it is emphasized, it is an order based on Section 301 and in conformance with the direction of *Burns* which is contained in the following language:

> "[*Wiley* held only that] the agreement to arbitrate, . . . survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by *other provisions of the contract.*" 40 U.S.L.W. at 4503. (emphasis supplied).

This troubling issue in the case at bar is presented by virtue of the small number of employees formerly employed by Grissom and subsequently employed by the successor Company. Certainly this is an element in determing the "continuity of identity" issue. Actually, most "successor" cases involve situations where a substantial number of employees are retained by the successor. (See *Retail Clerks Union* v. *Lynn Drug Co.*., 299 F.Supp. 1036, 1039, 1040 (S.D. Ohio 1969) and cases therein cited.)

The role of the District Judges is no more clearly illustrated than in the case of *Monroe Sander Corporation* v. *Livingston*, 377 F.2nd 6 (2d Cir. 1967) with regard to this issue of the rights of terminated employees. In *Monroe Sander*, the Court ordered arbitrations ". . . of the general issue of whether the union is entitled to rights and benefits, especially jobs, . . ." in a case where none of the predecessor's employees were hired by the successor where there was a move of location. The majority opinion stressed the national labor policy favoring arbitration and the opportunity for judicial review. In his dissent, Chief Judge Lumbard found that the demands of the union regarding jobs were not arbitrable under *Wiley* precept that:

> ". . . the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." 377 F.2d at 14.

Thus, here, where the union, in its complaint, alleges several grievances, some having to do with claims other than job continuity; where the arbitration proceedings would permit thorough exploration of all facets; and where a number of employees represented by the union have been retained by the successor, it appears to be the better policy and the more prudent to follow strictly the *Burns'* interpretation of *Wiley* that it be left to arbitration to determine the "ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract."

In this vein, the language of *United Steelworkers* v. *Reliance*, 335 F.2d 891, 894-5 (3rd Cir. 1964) is particularly appropriate:

> "One important matter remains. The opposing parties here have argued for and against the proposition that the collective bargaining agreement is unqualifiedly binding upon Reliance, as would have been the case if there had been assignment or novation substituting Reliance as a party to the instrument. But, in the Wiley case, the Supreme Court seems to have been careful to avoid so broad a ruling. It merely reasoned and decided that federal labor law imposed upon a succeeding proprietor a duty to arbitrate those questions which his predecessor was bound to arbitrate under his labor contract. The fact that the plant covered by the labor contract had been closed and its employees mingled with other workers with independent and perhaps different rights at another plant may well have influenced this careful limitation of the Wiley holding.
>
> "In any event, we find implicit in the guarded language of the Wiley opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances."

PRELIMINARY INJUNCTION

The union also requests a preliminary injunction which would, in effect, require the Company to hire or rehire the former Grissom employees. This the Court must decline to do.

While recognizing the plight of the terminated employees, it must also consider that new employees have been hired and financial harm to them would result. Granted the terminated employees have vested interests and will not be free from temporary financial harm, restitution and reimbursement is available to them depending on the decision of the arbitrator.

Furthermore, arbitration should not be a lengthy, time-consuming process and there should be an attempt to avoid disruptive changes.

Another consideration in the decision to issue a preliminary injunction is the requirement that the plaintiff must demonstrate probable success on the merits (*Estee Lauder, Inc.* v. *Watsky*, 323 F.Supp. 1064, 1067 (S.D.N.Y. 1970)) and here the situation is not well enough developed for the Court to prognosticate that result.

It should also be bourne in mind that although the Grissom employees had notice of their termination on July 9, 1972, and the union, officially, by July 13, 1972, it did not seek to demand arbitration or institute suit until the afternoon of July 21, 1972. Meanwhile, the Company was recruiting, hiring and training other employees. The equities, then, are not without a semblance of balance.

REMAND

In candor, this Court was gravely concerned over the issue of remand to the state court, especially because of its firm (albeit not entirely objective) belief and complete confidence in the competence and ability of the state court. Particularly was this concern manifested when considering the implications of a potential contempt action.

However, there are overriding considerations not the least of which is the urgency inherent in this type of situation. (Parenthetically, an urgency recognized by the Court and responded to within its capabilities and other court commitments.) More important, certainly, is the suggestion of Judge Moody that the matter be handled by this Court with dispatch.

Considered, also, was the fact that Judge Moody dissolve the injunction even though there had been a hearing relating to the alleged refusal to obey its terms and the fact again that the plaintiff did not act with the utmost diligence.

The recent case of *Grubbs* v. *General Electric Credit Corp.*, 40 U.S.L.W. 4388 (U.S. April 18, 1972), buttresses this approach in this area of mutual jurisdiction and removal.

Nor does this Court ascribe to defendants' counsel any such nefarious purposes and intentions as plaintiff would have it. Time was a factor, then, as it is now and the Motion to Remand is denied.

An order may enter in accordance with the foregoing.

By: /s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: August 22, 1972.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Plaintiffs,* vs. HOWARD JOHNSON COMPANY, INC., a Maryland corporation; P.L. GRISSOM & SON, INC. and BELLEVILLE RESTAURANT COMPANY, INC., Michigan corporations, *Defendants.*	Civil Action No. 38654

ORDER

At a session of said Court held in the Court House in the City of Detroit this 25th day of August, 1972.

PRESENT: The Honorable PHILIP PRATT
United States District Judge

This matter having come on to be heard by the Court on the Motion of Plaintiff, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, to compel Arbitration by Defendants, for certain other injunctive relief and to remand this cause to the Circuit Court for the County of Wayne, State of Michigan and this Court being fully advised in the premises.

IT IS HEREBY ORDERED that Defendants, Howard Johnson Company, Inc. and Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., arbitrate with Plaintiff, Detroit Local

Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, issues arising under the collective bargaining agreements between Plaintiff and Defendants, Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., effective January 1, 1968 and August 1, 1968, respectively, relating to the obligation and liability of Defendants to Plaintiff and to the employees represented by Plaintiff under the provisions contained in the aforesaid agreements pursuant to the Memorandum Opinion of the Court issued on August 22, 1972.

IT IS FURTHER ORDERED that the Motion for Injunctive Relief to return to work the approximately 53 employees separated from employment at the Belleville facilities and the Motion to Remand this cause to the Circuit Court for the County of Wayne, State of Michigan is denied.

PHILIP PRATT
United States District Judge

U. S. District Court)
Eastern District of Mich.) ss

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk

By: /s/ Donald M. Currie
Deputy Clerk

Dated:

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Plaintiff,* vs. HOWARD JOHNSON COMPANY, INC., a Maryland corporation; HOWARD JOHNSON MOTOR LODGE, INC., a Michigan corporation; and BELLEVILLE RESTAURANT COMPANY, INC., a Michigan corporation, *Defendants.*	Civil Action No. 38654

MEMORANDUM AND ORDER GRANTING STAY PENDING APPEAL

Plaintiff instituted its suit under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1971), seeking to compel arbitration. Plaintiff, in addition, sought to compel defendant Howard Johnson to hire or refrain from discharging employees belonging to plaintiff who had been employed by the Grissom interests prior to the takeover by defendant Howard Johnson of the restaurant and motor lodge operations. This Court ordered that defendant Howard Johnson arbitrate but denied the prayer regarding the employees.

Defendant Howard Johnson has filed its Notice of Appeal and is proceeding expeditiously in that regard. It now requests a stay of the order compelling arbitration under Rule 62(c).

Rule 62(c) provides as follows:

> "When an appeal is taken from an interlouctory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

The order of the Court compelling arbitration is, in its effect, an injunctive order and, as is explicit in 62(c) a stay is a discretionary issue, W. Barron & A. Holtzoff, Federal Practice and Procedure, §1373 (Wright Ed. 1958); 7 J. Moore, Federal Practice, ¶62.05 (1971).

The Court is persuaded by the analysis and reasoning of *Camden Industries Co.* vs. *Carpenters Local*, 246 F. Supp. 259, (D.N.H. 1964), a case which has great factual similarity to the case at bar. In *Camden*, the Court said:

> "It is the Court's policy to place no impediment in the way of full review of its pronouncements, unless the circumstances of a particular case indicate that to do so would prejudice the rights of a party. In this case, plaintiff has represented to the Court that the preparation and presentation of its position to an arbitrator will involve significant time and expense and the Court has no reason to doubt that this may be true. The Court is convinced that no meaningful prejudice will result to defendants if arbitration of their grievance is deferred, as passage of time will not affect the validity of their claims to higher wages under a now-expired collective bargaining agreement, nor will it affect the measure of their recovery should they be successful."
>
> 246 F. Supp. at 260

(Cf. *Dewey* v. *Reynolds Metals Co.*, 304 F. Supp. 1116 (W.D. Mich. 1969), etc., where first amendment rights were involved.)

Further, by denying the request for a mandatory order requiring defendant Howard Johnson to hire its "predecessors" employees, the Court has already, for the reasons given in its Memorandum Opinion, determined that the equities of the situation do not preponderate in favor of plaintiffs.

Perhaps most crucial, is the recognition of the need for an appellate determination of the major issue in the case – the status of the "successor" employer in the circumstances of this suit. This is particularly true because of the possible impact of the language contained in the recent decision of the Sixth Circuit in *NLRB* v. *Wayne Convalescent Center, Inc.*, ____ F.2d____(Aug. 29, 1972, No. 72-1081).

Any stay of this nature, contested as it is, presupposes diligence, expedition and good faith on the part of those concerned. The Court sees no reason to doubt the presence of those elements.

The Motion for Stay Pending Appeal is, therefore, granted.

PHILIP PRATT
United States District Judge

Dated: October 3, 1972.

U.S. District Court)
) SS.
Eastern District of Mich.)

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk

By: /s/ Donald M. Currie
Deputy Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.
Petitioner
v
DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO
Respondent

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.
Petitioner

v

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO
Respondent

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (hereinafter "Union"), hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet App 1a-12a) is not yet officially reported. The memorandum opinion of the United States District Court for the Eastern District of Michigan, Southern Division (Pet App 13a-26a) is not officially reported at this time.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1973. The petition for a writ of certiorari was filed on October 10, 1973. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether an employer who otherwise satisfies all criteria determinative of successorship status avoids such status merely by denying continued employment to its predecessor's employees.

2. Whether the extent to which a successor employer is bound by its predecessor's collective bargaining agreement is properly for consideration by an arbitrator.

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act (29 USC 141 et seq.) are set forth in the petition.

COUNTER-STATEMENT OF THE CASE

In 1959 and 1960, Petitioner, Howard Johnson Company, Inc. (hereinafter Howard Johnson), entered into two franchising agreements with P. L. Grissom & Son, Inc., a Michigan corporation (hereinafter Grissom). The first, denoted "Operator's Agreement," enabled Grissom to operate a Howard Johnson restaurant.[1] The second, denoted "License Agreement," enabled Grissom to operate a Howard Johnson motor lodge. (Joint App on Appeal 78-87.)

The two facilities, which are on adjacent sites in Belleville, Michigan, were operated under the provisions of the franchise agreements until July 24, 1972. Pursuant to such franchise agreements, Howard Johnson had the authority to exercise detailed control over Grissom's day to day operation of the restaurant and the motor lodge.

The tone of the relationship between Howard Johnson and Grissom can be seen in paragraph number one of the Operator's Agreement. It provided, in pertinent part, as follows:

> ". . . [Howard Johnson] shall determine and approve standards of quality for all commodities bought, used or sold on the . . . premises, standards of service in connection with their sale, and standards of quality and utility for all furnishings and equipment used on said premises in connection with such sale, and [Grissom] shall conform to said standards, and [Howard Johnson] may supervise the operation of [Grissom's] business at the . . . premises. [Grissom] shall continuously operate the

[1] Actually, the operator's agreement ran to Belleville Restaurant Co. which was controlled by Grissom. For convenience Grissom will be treated as owner and operator of both the restaurant and motor lodge.

> business on the premises upon such days and during such hours as [Howard Johnson] shall determine. [Howard Johnson's] supervisory personnel shall have the right to enter upon the premises at any time for the purpose of examining the same, conferring with [Grissom's] employees, and inspecting and checking merchandise, furnishings, equipment, and operating methods, in all divisions and departments, and determining whether the business is being conducted in accordance with the aforesaid standards and in accordance with this agreement."

Other provisions in the agreements restricted the products sold on the premises, regulated business operations and circumscribed financing. Further, Grissom was prohibited from disposing of "any interest in the said premises or any part thereof, or in the business thereon conducted, or in the equipment or furnishings located thereon, without in each instance first offering the same to [Howard Johnson], exclusively . . ."

Grissom operated the restaurant with thirty-nine employees and the motor lodge with fourteen employees. All fifty-three employees were represented for the purposes of collective bargaining by the Union. Grissom and the Union were parties to successive collective bargaining agreements covering separate units for the restaurant and for the motor lodge.

The last collective bargaining agreement between Grissom and the Union covering employees at the motor lodge was effective for the period beginning August 1, 1968 and ending August 1, 1972. The last collective bargaining agreement between the aforenamed parties covering restaurant employees was for the period January 1, 1968 to March 31, 1971 and was extended by addendum until May 1, 1974.

Both collective bargaining agreements between Grissom and the Union provided for final resolution of disputes by arbitration, contained a no-strike pledge and included a provision relating to the sale or transfer of operations. The "successor" clause provides:

> "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be affected voluntarily or by operation of law or by merger or consolidation with another company provided the establishment remains in the same line of business."[2] (Joint App on Appeal 103.)

On June 16, 1972, Grissom entered into a sales agreement with Howard Johnson whereby Grissom sold to Howard Johnson "chattels, fixtures, furniture, furnishings, equipment, machinery, appliances, implements, utensils, silverware, china, linen inventory and all other personal property" belonging to Grissom and located in or used in conjunction with the restaurant and the motor lodge; leased to Howard Johnson the restaurant and the motor lodge; and surrendered to Howard Johnson the franchise agreements.

Grissom warranted that at the time of sale it would have no creditors. However, Howard Johnson agreed to assume a liability owed by Grissom to a wholly owned subsidiary of Howard Johnson and further to assume and pay four separate commercial contracts that Grissom had entered into with various companies. (Joint App on Appeal 71, 76.)

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[2] A similar provision appears on one of several pages of the restaurant agreement omitted from the joint appendix through inadvertance. Those pages are attached hereto in the Appendix.

On July 11, 1972, Grissom and Howard Johnson entered into a supplement to the aforesaid sales agreement whereby the parties agreed that Howard Johnson "would not recognize and assume any labor agreements between [Grissom] and any labor organizations" and further that Howard Johnson "does not assume any obligations or liabilities of [Grissom's] resulting from any labor agreements or unfair labor practices." (Joint App on Appeal 90.)

On or about July 9, 1972, Grissom notified unit employees at both the restaurant and the motor lodge "that as of midnight, July 23, 1972, your employment . . . shall be terminated . . ." Contemporaneously, Howard Johnson began soliciting employment applications by, among other things, posting notices in the restaurant and motor lodge. Between July 18 and July 23, 1972, Howard Johnson hired thirty-three employees to work in the restaurant, nine of whom were in the restaurant bargaining unit represented by the Union. During that same period, Howard Johnson hired twelve employees to work in the motor lodge, none of whom were in the bargaining units represented by the Union.

At midnight on July 23, 1972, ownership and operation of the restaurant and motor lodge changed from Grissom to Howard Johnson. Notwithstanding the change in ownership of the enterprises, Howard Johnson conducted business operations identical in every respect to those of Grissom; it used the same trade name, occupied the same location, utilized the same facilities, used the same personal property, provided the same services and the same "products," employed the same approximate number of employees who performed the same type of jobs, and serviced the same customers. Thus, the only difference in operations was Howard Johnson's choice of personnel.

The District Court found Howard Johnson to be a successor of Grissom and ordered it to arbitrate with the Union issues arising under the collective bargaining agreements, referred to above, relating to Howard Johnson's obligations thereunder. The Court of Appeals affirmed.

ARGUMENT AGAINST GRANTING THE WRIT

1. The Sixth Circuit Correctly Decided the Issue of Successorship.

In *John Wiley & Sons, Inc* v *Livingston,* 376 US 543, 551 (1964) the Court set forth "substantial continuity of identity in the business enterprise before and after a change" as the test for determining successorship status. In reaching a determination on the issue of successorship, "[t]he answer to the problem does not rest on any one element but the combination of many." *Drivers, Warehouse and Dairy Employees Union Local No 75* v *Wisconsin Employment Relations Board,* 138 NW2d 180 (Wisc S Ct 1965), cert den 384 US 906 (1966). Successorship determinations turn upon the "precise facts involved" in each case. *NLRB* v *Burns International Security Services, Inc,* 406 US 272 (1972).

Applying the precise facts of this case to the "continuity of enterprise" standard, the Sixth Circuit relied upon the following factors to find successorship:

(a) Howard Johnson purchased and utilized substantially all of the assets of Grissom.

(b) Howard Johnson continued the identical business, at the same location and used the same trade name as had Grissom.

(c) Howard Johnson commenced operations momentarily after Grissom ceased such operations.

(d) Howard Johnson provided substantially the same products and services as had Grissom.

(e) Howard Johnson through the vehicle of franchise agreements possessed close control over Grissom's management and activities of the restaurant and motor lodge (Pet App 6a).

Howard Johnson's refusal to hire most of Grissom's employees did not affect its successorship status for several reasons. First, in *Wiley* the Court stated,

> "Although Wiley was substantially larger than Interscience, relevant similarity and continuity of operations across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." (p 481).

Thus, the hiring of employees is not the controlling factor but rather may be evidence of similarity of operations. *Monroe Sander Corporation* v *Livingston*, 377 F2d 6, (2nd Cir 1967), cert den 389 US 831 (1967). It is but one of the elements to be considered in reaching a conclusion on successorship. The hiring of most of the predecessor's employees has been found in and of itself insufficient to establish successorship. *NLRB* v *Aluminum Tubular Corporation*, 299 F2d 595 (2nd Cir 1962); *NLRB* v *Alamo White Truck Service, Inc.*, 273 F2d 238 (5th Cir 1959); *Georgetown Stainless Mfg Corp*, 198 NLRB No 41 (1972); *Lincoln Private Police, Inc*, 189 NLRB No 103 (1971).

Second, a "successor's" failure to hire its "predecessor's" employees cannot be determinative where said "failure is the nub of the dispute." *Monroe Sander*, 377 F2d at 12. The Sixth Circuit recognized the logic of this position when it stated,

> "Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees."

Finally, "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses . . . be balanced by some protection to the employees from a sudden change in the employment relationship." There will be no balancing of these competing interests and no protection whatsoever to employees if the hiring of employees by the employer is to be the controlling factor. As the Sixth Circuit said,

> "If Howard Johnson sought to retain the agreement negotiated by Grissom, it would hire a majority of Grissoms' employees. If, on the other hand, it wished to disregard the collective bargaining agreement, it would simply hire none or at best only a few of the former employees. The decision whether to hire the predecessor's employees should turn upon other and more relevant considerations."

The "more relevant considerations" are precisely those found by the Sixth Circuit and alluded to above.

2. Successorship Cases Arising Under 29 USC 185 Are Not Governed by NLRB Cases Arising Under 29 USC 158.

Proceedings under section 185 involve civil suits for violation of contracts between an employer and a labor organization brought in federal or state courts. Such suits involve the application or interpretation of agreements and not the establishment of collective bargaining rights

or obligations. Indeed, a section 185 suit may be initiated by a minority union. *Retail Clerks, Locals 128 and 633* v *Lion Dry Goods Inc*, 369 US 17 (1962).

On the other hand, proceedings under section 158 involve unfair labor practices wherein an administrative agency seeks to vindicate public rights rather than private ones between competing parties. Thus, under section 158(a)(5) the NLRB endeavors to remedy an employer's refusal "to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)." And section 159(a) makes the representative selected by a majority of unit employees the exclusive representative of all unit employees.

The fundamental distinctions between the nature of section 185 proceedings and those under section 158 render inapplicable Howard Johnson's contention that the test of successorship must be identical in a suit to compel arbitration and an administrative action to compel recognition and bargaining. In the latter instance, the NLRB's concern with sections 157, 158 and 159(a) will not ordinarily permit it to direct a "successor" employer to bargain where its work force (absent section 158(a)(3) discrimination) is composed of less than a majority of it "predecessor's" employees. The Board appears to treat such a situation as a new unit restricting its rights to order bargaining.[3] The Courts, on the other hand, are concerned not with statutory bargaining rights but with contract rights involving the application of various provisions and need not give

[3] *Cf J P Stevens and Co Inc*, 163 NLRB 217 (1967) where the Board in denying a bargaining order said, "In view of the majority principle in Section 9(a) of the Act, we have serious doubts that the policies of the Act require or permit the issuance of a bargaining order where majority status has never been attained."

overriding consideration to the question of a union's majority status. *Lion Dry Goods.*

Howard Johnson's contention that *Burns* superimposes on *Wiley* a requirement that arbitration can only be ordered when the "successor's" work force is composed of a majority of its "predecessor's" employees, confuses the distinctions noted above between proceedings under section 158 and those under section 185.

3. There Is No Conflict Among The Circuit Courts Of Appeal.

Howard Johnson asserts that there is a clear conflict between the decision in this case and the position adopted by several Circuit Courts of Appeal. It relies for this proposition on refusal to bargain cases arising before the NLRB. The distinguishing features of suits for breach of contract and administrative proceeding for refusal to bargain have been referred to above. It is submitted that the cited cases originating before the NLRB are inapposite. Similarly, Howard Johnson's contention that this case is in conflict with decisions of other Circuits involving suits to compel arbitration is not well founded.

Printing Specialties & Paper Products Union No. 447, IPP & AU v *Pride Papers-Aaronson Bros Paper Corp,* 445 F2d 361 (2d Cir 1971) cert den 404 US 1001 (1971), involved a consolidation. Roitman Paper Co. operated a plant with seven employees who were represented for bargaining by Pressmen. Roitman was consolidated with Aaronson Bros. Paper Co. that operated a plant with twenty-six employees who were represented for bargaining by Teamsters. The court said,

> "[C]ontinuity in the business operations is the essential test for successorship . . . In effect, all

> that really occurred in the instant case is that Roitman closed down his small business and discharged his employees. *He then acquired an interest in a new business at a different location, with different employees.*" (Emphasis supplied.)

Furthermore, *Pride Papers* was not a suit to compel arbitration. It was a suit for declaratory judgment that the collective bargaining agreement was still in effect at the new consolidated plant.

In *Owens-Illinois Inc* v *District 65, Retail, Wholesale and Department Store Union, AFL-CIO*, 276 FSupp 740 (SD NY 1967), aff'd 393 F2d 932 (2nd Cir 1968), the court examined the "precise facts" of the case to determine the question of "substantial continuity of identity in the business enterprise." Significantly, hiring of the "predecessors" employees was but one of a myriad of factors that led the court to conclude that continuity was not present. Among the factors the court noted were the following: (a) The "successor" clause between Atlantic and District 65 was contained in a secret memorandum unknown to Owens-Illinois, (b) Atlantic was adjudicated a bankrupt, (c) Atlantic's production employees were all discharged and thereafter its plant was inoperative for almost six months, (d) Atlantic's Plan of Arrangement provided that its sale of assets to Owens-Illinois was "free and clear of any and all rights, claims, etc., (e) thirty-one of the original thirty-three employees of Owens-Illinois were transferred to the plant in question from its nearby plant, (f) the operations of the two plants became fully integrated and (g) the employees at the two plants were represented by another union.

The "substantial continuity of identity" test was applied in *Monroe Sander*. Thus, the Second Circuit stated.

> "Here, it appears that the district Court was correct in finding that there was 'any substantial

> continuity of identity' between the Long Island City and Newark operations. *Both plants were located in the New York metropolitan area, both were engaged in the same line of business, the jobs in each were seemingly similar and Petrochemical planned to have the New Jersey plant service Sander's customers.* Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of operations." (Emphasis supplied.)

In commenting upon *Monroe Sander* in the subsequent *Pride Papers* case, the court said,

> "In Monroe Sander Corp. v Livingston [citation omitted] we found a successorship although none of the former employees were hired by the successor corporation. In that case, however, *continuity was evidenced by many factors, not the least of which was the fact that the transaction involved 'a parent corporation's termination of one subsidiary plant and the purchase of another.'*" (Emphasis supplied.)

The "many factors" evidencing continuity are present in the immediate case. Moreover, the franchisor-franchisee relationship here is sufficiently similar to the parent-subsidiary relationship in *Monroe Sander* to make the distinction raised by Howard Johnson one of form rather than substance.

4. The Decision of the Sixth Circuit Court of Appeals Ordering Arbitration Comports With National Labor Policy Objectives.

The balancing of employer rights to rearrange their businesses as against employee rights to protection from changes in the employment relationship dictates arbitration as the vehicle for avoiding industrial strife and promoting industrial peace. This Court has recognized and spoken strongly in favor of arbitration as the best method for resolving labor management disputes. *United Steelworkers of America* v *American Manufacturing Co*, 363 US 564 (1960); *United Steelworkers of America* v *Warrior & Gulf Navigation Co*, 363 US 574 (1960); *United Steelworkers of America* v *Enterprise Wheel & Car Corp*, 363 US 593 (1960).

"The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. . . . " *Wiley*, 376 US at 549-550. Indeed, the preference for arbitration as a means of preserving industrial peace is so great that it has been ordered even when it appeared to be a remedy of questionable value. *Carey* v *Westinghouse Electric Corporation*, 375 US 261 (1964).

There are legitimate policy reasons for leaving the applicability of substantive provisions in the collective bargaining agreement to the arbitrator. This Court has recognized the special "experience and competence" of an arbitrator in resolving industrial disputes. *Warrior & Gulf*, 363 US at 581-582. The NLRB has recognized the "special skill and experience" of the arbitrator in contract inter-

pretation by its policy of defering to arbitration. *Collyer Insulated Wire, A Gulf and Western System Co,* 192 NLRB No 150 (1971). The arbitrator may devise "flexible procedures" that will promote industrial peace (*Wiley,* 376 US at 551 n.5) for a situation not adequately provided for in the collective bargaining agreement. *Warrior & Gulf Co,* 363 US at 580-581 (1960).

The Third Circuit in directing arbitration in *United Steelworkers of America* v *Reliance Universal Inc,* 335 F2d 891, 895 (3rd Cir 1964), recognized the flexibility of arbitration and stated:

> "In any event, we find implicit in the guarded language of the *Wiley* opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances. Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract."

Thus, the Sixth Circuit, quoting *Reliance Universal,* ordered arbitration as the most reasonable and equitable forum for balancing employer and employee rights and interests in successorship situations. That remedy is fully warranted and appropriate in view of the national labor policy favoring arbitration.

CONCLUSION

Howard Johnson's position that the identity of the employee work force is the sole determinative factor in deciding the question of successorship is untenable. The test of successorship is "substantial continuity of identity of the buiness enterprise before and after the change." The identity of the work force is only one factor to be considered along with many others present in this case.

Were Howard Johnson's position to be adopted, the employees' jobs would be completely dependent upon the employer's desire either to retain or to disregard the existing collective bargaining relationship. If it wanted to retain the relationship, the employer would hire a majority of the existing work force. If, on the other hand, it wanted to disregard the relationship it would not hire a majority of the existing work force. In short, Howard Johnson would retain for itself the unilateral power and authority to decide whether or not it shall be a successor with the responsibilities incumbent upon successor employers. Such a rule of law would not permit the balancing of employer-employee rights and interests in successorship cases. Only the rights and interests of the employer would prevail. Such an inequitable rule would be contrary to the policy of our national labor laws which favor the balancing of competing interests and arbitration as the best means of resolving those interests.

For the above reason, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 7. A copy of this contract shall be posted in a prominent place to which the public shall not have access.

Section 8. A bulletin board wil lbe provided for the sole use of the Union for posting notices of meetings and other proper Union activities.

Article XII

Concessionnaire Clause

Section 1. In the event the Employer leases or turns over to any person or persons the operation of any department of his establishment, the Employer shall give the Union ten (10) days' notice in advance of such contemplated lease or arrangement. The Employer shall also require of such tenant or other person as a condition precedent to such tenancy or arrangement that such tenant or other person shall fully observe all provisions of this Agreement and that his failure to do so completely and entirely shall represent a breatch of tenancy for which eviction shall occur. Furthermore the Employer shall be personally liable for any and all damages resulting from the failure of the lessee or other person to observe any and all terms of this Agreement.

Article XIII

Sale or Transfer

Section 1. It shall be the duty of the Employer to inform the Union in writing at least ten (10) days in advance of any sale, transfer or other changes in ownership. Failure on the Employer's part to so notify the Union

shall render the Employer liable for any subsequent failure of the new owner to pay the employees on the basis of the provisions of this contract, said liability to extend for the period of one (1) week after the change in ownership or until the Union receives notice of such change, whichever occurs later.

Section 2. This Agreement shall be binding upon the employer's successors, assigns, purchasers, lessees or transferees whether such succession, assignment or transfer be affected voluntarily or by operation of law; and in the event of the employer's merger or consolidation with another company or companies, this Agreement shall be binding upon the merged or consolidated company, provided the establishment remains in the same line of business.

Article XIV

No Strike—No Lockout

Section 1. Under no circumstances will the union cause or permit its members to cause nor will any member of the bargaining unit take part in any strike, sit-down, stay-in or slowdown in any establishment of the Employer or any curtailment of work or restriction or production or interference with the operations of the Employer or any picketing or patrolling during the terms of this Agreement. In the event of a work stoppage, other curtailment of production, picketing or patrolling, the Employer shall not be required to negotiate on the merits of the dispute which gave rise to the stoppage or curtailment until same has ceased.

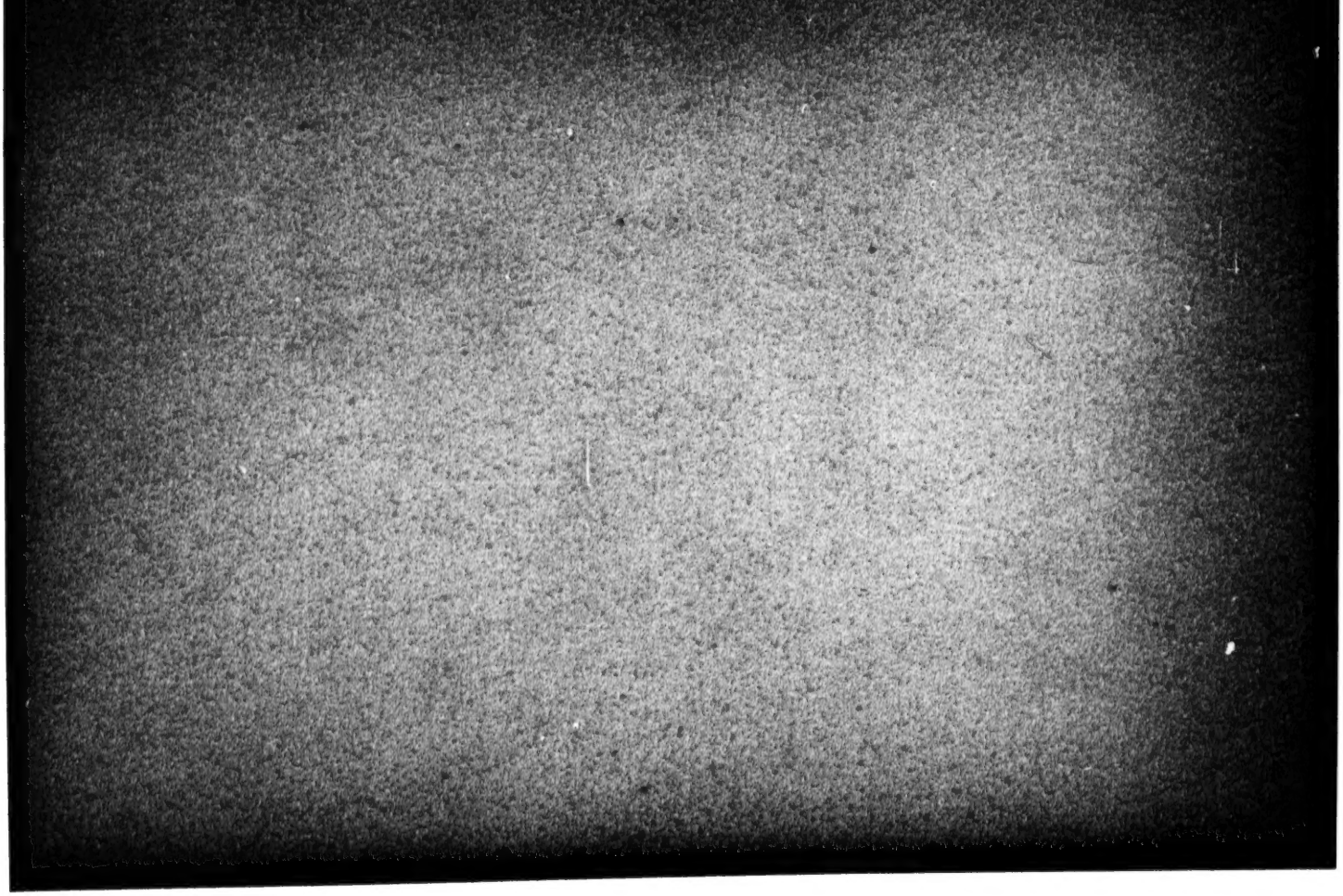
Section 2. The Employer will not lockout any employees during the term of this Agreement.

Article XV

Management Rights

Section 1. Nothing in this Agreement shall be construed to limit or impair the right of the Employer to exercise its own discretion on all of the following matters, whatever may be the effect upon employment, when in its discretion it may determine it advisable to do any or all of the following:

to manage its business generally,
to decide the number and location of stores,
to decide all equipment to be used,
to decide all items to be served or sold,
to decide the method and means of sale of products,
to determine work schedules for employees,
to hire, layoff, assign, transfer and promote employees (a complaint by local 234 of improper classification shall result in a joint job-content analysis to determine the validity of same),
to determine the qualifications of employees,
to determine and redetermine job content,
to determine the starting and quitting time,
to determine the number of hours to be worked,
to make such reasonable rules and regulations not in conflict with this Agreement, as it may from time to time deem best for the purpose of maintaining order, safety and/or effective operation and after advance notice thereof to the union and the employees, to require compliance therewith by employees,
to discipline and discharge employees for cause.



SUPREME COURT, U. S.

FEB 21 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

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Petitioner,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-631.

HOWARD JOHNSON COMPANY, INC.,

Petitioner,

vs.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* on behalf of Petitioner in the instant case.*

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* The Petitioner has consented to the Chamber's participation in the instant case. Respondent, by its Counsel, requested a copy of the Chamber's brief as a condition precedent to Respondent's

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The instant case raises issues of fundamental importance for a significant number of the Chamber's members in the ordinary conduct of their businesses.

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determination as to whether it would give its consent to the Chamber's participation herein. On Monday, February 11, 1974, a copy of a draft of the Chamber's proposed brief was mailed to Counsel for Respondent. On Thursday, February 14, 1974, Respondent's Counsel having studied the submitted draft, notified Attorneys for the Chamber that Respondent would not consent to the Chamber's participation as *amicus curiae* herein. The final version of the Chamber's brief accompanying the instant motion is in no material respect different from the draft forwarded to Respondent's Counsel on February 11.

** *E.g., Gateway Coal Company* v. *United Mineworkers of America, et al.*, ... U. S. .... (Jan. 1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.* (Supreme Court), No. 72-1554; *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.* (Supreme Court), No. 73-235; *N. L. R. B.* v. *Bell Aerospace Company Division of Textron, Inc.* (Supreme Court). No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971).

The questions presented for review are, first, whether an employer who purchases the assets of an ongoing enterprise may be compelled to arbitrate with a union under the terms of a collective bargaining agreement negotiated between the seller and the union; and, second, whether an employer who purchases the assets of an ongoing enterprise is a "successor" employer even though a majority of its employees were never employed by the predecessor employer nor are members of the union which represented the predecessor's employees. The instant case thus involves a direct conflict between the rationale and policy considerations underlying this Court's decisions in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964), which focused on the continuation of the successor's duty to arbitrate under a predecessor's contract, and *N. L. R. B.* v. *Burn's International Security Services, Inc.*, 406 U. S. 272 (1972), which declared a successor free of the constraints of his predecessor's contract. This case therefore calls into question the continuing validity of *Wiley*. This matter is of national concern because the ability of employers generally to invest in marginal businesses and make changes in personnel, practices and policies necessary to make such marginal businesses productive is unduly restricted by compelling them to arbitrate under the terms of the predecessor's labor agreement.

Since the Chamber's membership consists of numerous employers who frequently and regularly are in a position to acquire or sell ongoing businesses, and who must therefore know what their rights and duties are, the Chamber is vitally concerned about the manner by which these questions will be resolved by this Court. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the questions involved herein which might not otherwise be advanced by the parties and which have not been advanced in their briefs.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE.

INTEREST OF THE AMICUS.

The interest of the *amicus curiae* is set forth at pages 2, 3 of the foregoing Motion.

SUMMARY OF ARGUMENT.

I.

The instant case brings two decisions of this Court into direct conflict. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964) is based on the theory that an agreement to arbitrate contained in a labor agreement negotiated by a labor organization and an employer survives the collective relationship that gave it life and thus serves to compel a successor employer, who was not a party to the agreement, to honor that agreement. *N. L. R. B.* v. *Burns International Securities Services, Inc.*, 406 U. S. 272 (1972) is based on this Court's conclusion that the substantive terms of a collective bargaining agreement do not survive the relationship between the labor organization and employer who negotiated it, and a successor employer is under no obligation to honor its terms. These two theories are irreconcilable, and their combined coexistence fosters inconsistent application of the federal labor laws contrary to Congressional design and mandates of this Court.

The perpetuation of *Wiley* leads to results inconsistent with objectives of national labor policy in contrast to *Burns* which, by giving effect to the basic principle of free collective bargaining, properly balances the rights of all parties and achieves consistency with the overall purpose of the Act. In light of *Burns*, *Wiley* is no longer valid and should be overruled.

II.

Even if this Court should decline to overrule *Wiley*, the standard for determining successorship status should be the same regardless of forum. This Court, the lower courts and the Board require that a majority of an employer's work complement consist of former employees of the successor, or other persons represented by the Union, before an employer becomes a successor. Until an employer meets this test for successorship, he is under no obligation that devolves upon that status.

ARGUMENT.

I.

AS A RESULT OF THIS COURT'S DECISION IN N. L. R. B. v. BURNS INTERNATIONAL SECURITY SERVICES, INC., JOHN WILEY & SONS v. LIVINGSTON IS NO LONGER VIABLE AND SHOULD BE OVERRULED.

In *John Wiley & Sons* v. *Livingston*[1] this Court held that an employer who acquired a business by merger could be compelled to honor the arbitration provisions of a collective bargaining agreement that had been negotiated by its predecessor but which the successor employer had not agreed to assume. And, while the Court only held that the successor was required to honor the arbitration provisions of the agreement, it expressly indicated that under its holding the arbitrator could find that substantive terms of the agreement survived the merger,[2] and the successor could therefore be compelled to honor them. In *N. L. R. B.* v. *Burns International Security Services, Inc.*,[3] this Court held that the National Labor Relations Board could not compel a successor employer to honor the substantive terms of a collective bargaining agreement entered into by its predecessor employer.

In the instant case, a suit to compel arbitration, the Sixth Circuit below, finding the Petitioner to be a successor,[4] deter-

1. 376 U. S. 543 (1964).

2. 376 U. S. at 555.

3. 406 U. S. 272 (1972).

4. The Sixth Circuit below held that Howard Johnson was a successor to Grissom despite the fact that the majority of Howard Johnson's employee complement were neither former employees of Grissom nor members of Respondent Union. This determination is erroneous because regardless of whether a successor's obligation is to arbitrate or merely to bargain the existence of successorship status should be judged by the same criteria. This issue is discussed

mined that Petitioner must submit to arbitration under the predecessor's labor agreement with Respondent, wherein the arbitrator could, under the authority of *Wiley*, compel Petitioner to honor substantive terms of that agreement. The Court below recognized the inherent inconsistency between the rationale of *Wiley* and that of *Burns* but attempted to reconcile them. The Court reasoned that while *Wiley* was an action under Section 301[5] of the Act[6] to enforce the arbitration provisions of a collective bargaining agreement, *Burns* involved a National Labor Relations Board proceeding for refusal to bargain with respect to a collective bargaining agreement[7] and that *Burns* merely rejected the Board's authority to require the employer to honor all the substantive terms of the agreement while leaving undisturbed the arbitrator's authority, under *Wiley*, to determine which of the substantive terms the successor should be required to honor.

Wiley and *Burns* are not so easily accommodated. They are logically irreconcible and their continued co-existence permits a dichotomy that threatens to unravel the fabric of uniformity

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at Part II of the Chamber's brief, *infra*. However, the Sixth Circuit's decision with respect to the existence of successorship status is based on its view that the obligation to arbitrate imposed on a successor by *Wiley* is not negated by *Burns*. The decision below thus raises the question, posed by the conflict between *Wiley* and *Burns*, of whether the *Wiley* imposed obligation to arbitrate can co-exist in light of *Burns*, irrespective of the criteria used to determine successorship status.

5. Sec. 301, Labor Management Relations Act, 29 U. S. C. Sec. 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees employed in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amounts in controversy or without regard to the citizenship of the parties."

6. Labor Management Relations Act, as amended, 29 U. S. C. Sec. 141, *et seq.*

7. Sec. 8(a)(5), 29 U. S. C. 158(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . "

that Congress has sought and that this Court has directed in the establishment and enforcement of a national labor policy. The obligation imposed on a successor employer by *Burns* comports with that policy in all respects and renders *Wiley* without purpose or reason for continued existence within the body of Federal Labor Law.

A. The Rationale of Wiley and That of Burns Are Irreconcilible and Cannot Logically Be Accommodated.

Wiley is based on the theory that the arbitration provisions of the predecessor's labor agreement survive the transaction by which the new owner or operator of the business succeeds as the employing entity. The successor is at least bound to honor the arbitration terms of the contract, and, as a result of the arbitrator's decision, some or *all* of the substantive terms of the agreement could also "survive" and be imposed on the successor by the arbitrator. Under *Burns*, the predecessor's labor agreement does not survive; since the contract does not survive, the successor is under no cumpulsion to honor any of its substantive terms. As a matter of pure logic, these two theories cannot be reconciled. Under the *Wiley* theory of "selective survival" the successor is compelled indirectly to do that which under *Burns* he has no duty to do.

The Court below suggests that the conflict is not irreconcilible and that this Court did not intend to "eviscerate" *Wiley* because this Court, in *Burns*, only rejected the Board's theory that all the substantive terms of the contract survive; that it did not reject the theory that through the process of "selective" survival some or *all* of the same terms might survive. There is no rational distinction between survival of the agreement *in toto* or survival of the agreement "selectively". Indeed, the contention made by the Board in *Burns* is a logical extension of the *Wiley* rationale,[8] and this Court in its *Burns* decision rejected it.

8. See Feller, *Change of Ownership and Representation Problems: A Union Counsel's View*, Proceedings of New York Uni-

Some commentators,[9] in attempting to reconcile the conflict in rationale between *Wiley* and *Burns*, have suggested that *Wiley* is merely an exception to this Court's long adherence to the principle that freely negotiated agreements, without compulsion or duress, are the sound basis for establishing stable bargaining relationships and preventing industrial strife.[10] In *Burns* even this Court, in reasserting the voluntary nature of the collective bargaining agreement, distinguished *Wiley* as a "[L]imited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes. . ." whose ". . .[N]arrower holding dealt with a merger occurring against a background of state law. . ." *Id.*, at 286.

However, the *Wiley* rationale is not so limited. On the authority of *Lincoln Mills*,[11] the *Wiley* Court rejected the Union's reliance upon the State law governing mergers as having any significance to the determination of the successor's obligation, concluding that "federal law, fashioned 'from the policy of our national labor laws', controls."[12] *Wiley, supra*, at 548.

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versity 18th Conference on Labor 275 (Christensen ed., 1966); Doppelt, *Successor Companies: The N. L. R. B. Limits The Options And Raises Some Problems*, 20 DePaul L. Rev. 176 (1971).

9. See Note, *Contractual Successorship: The Impact of Burns*, 40 U. Chi. L. Rev. 617 (1973); Swerdlow, *Freedom of Contract in Labor Law*, 51 Tex. L. Rev. 1 (1972).

10. In *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), wherein this Court upheld the Constitutionality of the National Labor Relations Act, The Court stated:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . The theory of the Act is that full opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not compel." *Id.*, at 45.

11. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

12. *Wiley* is clearly not limited just to mergers in states where the corporation laws provide for the surviving Company to assume the obligations of the disappearing company. In *Wiley* the Court stated: "[T]his is so as much in cases like the present, where the contracting employer disappears into another by merger, as those

Thus, as a matter of federal labor law, the *Wiley* Court determined that a collective bargaining agreement is not the "simple product of a consensual relationship", and that notwithstanding the fact that a successor is not a party to the agreement, it is compelled to arbitrate under it and, therefore may be required to honor its substantive terms.

In essence, *Wiley* creates a fiction of "survival". In *Burns*, this Court rejected the fiction. The *Wiley* fiction cannot logically be reconciled with *Burns*.

B. Perpetuation of a Uniform National Labor Policy Requires Uniformity of Obligation Under the Law; the Continued Co-Existence of Wiley and Burns Is Destructive of That Policy.

If the fiction of *Wiley* is to be maintained it can only be maintained at the expense of the uniformity that Congress and this Court have sought in the creation and enforcement of a national labor policy. In *Lincoln Mills, supra,* this Court held that Congress directed the Courts to fashion a federal law "from the policy of our national labor laws." *Wiley* gives effect to the policy favoring arbitration. *Burns* emphasizes the strong preference of national labor policy for voluntary agreements. In terms of the obligations imposed on a successor employer, the co-existence of these two policies results in a dichotomy.

As a result of a Section 301 suit, a successor may be compelled to accept some or all of the terms of an agreement which it did not negotiate, contrary to the specific language of Section 8(d).[13] The objective of national labor policy,—the prevention

in which *one owner replaces another but the business entity remains the same." Id.*, at 549.

13. Section 8(d), 29 U. S. C. 158(d) provides:

"For purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other items and conditions of employment, or the negotiations

of industrial strife through collective bargaining,—is not fostered by such a dichotomy,[14] and this Court must decide whether, in light of *Burns*, *Wiley* any longer serves that object.

1. Wiley Cannot Be Maintained on Policy Grounds

In *Burns*, this Court was presented with the question of whether agreement by compulsion or the process of freely negotiated agreement better serves the objectives of collective bargaining. The same considerations of policy are involved in the instant case since the question involved herein is whether the national labor policy is better served by what is in essence compulsory arbitration or by freely negotiated agreements. Reflection on the Congressional purpose of Section 8(d) compelled this Court to state in *Burns* that: "Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or *voluntary* arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." *Burns, supra,* at 282. The key word is "voluntary," because nothing contained in the body of federal law fashioned under Section 301 (except *Wiley*), sanctions the *compulsion* of collective bargaining terms. *Lincoln Mills, Lucas Flour* and the *Trilogy*[15] do not sanction it because those cases involved the enforcement of covenants to arbitrate *voluntarily* undertaken by the parties who negotiated the agreements.

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of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*" (Emphasis added)

14. In *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling." *Id.*, at 103-104.

15. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *United Steelworkers* v. *Carrier & Gulf Nav. Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960).

Further, the distinction, drawn by the Court below, that the policy against compulsion expressed in 8(d) only serves as a restriction on the Board and not on the courts, is unsupportable. It is a distinction based on form, not substance. In terms of the policy reflected in Section 8(d) there is no reason why a successor employer's obligation should differ depending upon the Union's choice of forum. Such "forum shopping" will inevitably result if *Wiley* is not overruled. Thus, when a union desires the retention of a predecessor's contract, the union would sue to enforce its terms or the duty to arbitrate pursuant to its terms under Section 301. That would be the legacy of *Wiley*. If the union elected instead to negotiate a new agreement with the successor, then the union would pursue its rights under Section 8(a)(5) of the Labor Act, the end result of which would be an order to the successor to bargain anew. The successor employer, however, would have no such option, but would be wholly subject to the union's preferences. This unfortunate result is clearly contrary to this Court's decisions which have stressed the necessity for decisional uniformity in the area of labor relations.[16]

Moreover, such a restricted view of Section 8(d), which might on the surface appear to reconcile *Wiley* and *Burns*, misconceives the role of arbitration within the collective bargaining process. Arbitration is not the sole objective of national labor policy. It is "part and parcel" of the policy to "promote industrial stabilization through the collective bargaining process,"[17] and this is reflected in the literal language of Section 8(d).[18] In

16. E.g., *Lincoln Mills, supra; Lucas Flour, supra; San Diego Building Trades Council* v. *Garmon*, 395 U. S. 236 (1959); *Garner* v. *Teamsters Local 766*, 346 U. S. 485 (1953).

17. *American Mfg. Co., supra* at 578.

18. Section 8(d) provides in relevant part:
"[T]o bargain collectively . . . is to meet . . . and confer . . . with respect to . . . an agreement *or any question arising thereunder* . . . "
Arbitration, as the final step of that procedure, is thus within the ambit of Section 8(d).

Wiley this Court acknowledged that preference for the policy of arbitration could be overcome by other compelling considerations. In *Burns* it is recognized that the freedom to contract is such a compelling force. In terms of policy, *Burns* condemns all official compulsion,[19]—whatever the source. *Wiley*, on the other hand, permits official compulsion. The federal courts, through the means of the arbitration process, may compel a successor employer to honor the terms of an agreement to which it was never a party. In this respect, *Wiley* permits indirectly what *Burns* prohibits directly, and in so doing alters the traditional role of arbitration.

In traditional arbitration cases both the authority and the role of the arbitrator stem from and are circumscribed by the arbitration clause. His function is to interpret the terms of the agreement in accordance with the express intentions of the parties in light of their bargaining history and the arbitrator's experience in the industry:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra* at 587.

Where a successor, under *Wiley*, is compelled to arbitrate pursuant to the predecessor's contract, the arbitrator does not interpret an existing agreement because it does not "survive" and devolve on the successor employer. Rather, he decides what the terms of the agreement are which will then be binding upon the successor. In such a situation, the arbitrator, therefore, contrary

19. "[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *Burns, supra* at 287, quoting *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970).

to his legitimate role "dispenses his own brand of industrial justice" based on his own belief to as the equities involved. The arbitrator may refuse to bind the successor to the terms of the predecessor's agreement; he may bind the successor, or he may "re-write" the terms. Contrary to the assertion of the Sixth Circuit below, this arbitral "flexibility" in the successorship situation mandates *Wiley's* reversal in light of *Burns*. The arbitrator is permitted to perform a judicial function, *i.e.*, to decide if there is an agreement, what its terms are, and bind the successor to them. Not only is this a judicial function contrary to the arbitrator's legitimate role,[20] but it is conduct in which the court could not engage.[21]

Nor is the existence of *Wiley* necessary to perpetuate the valued role of arbitration within the collective bargaining process since that value is premised on the encouragement of parties to create a voluntary framework for the resolution of their disputes according to their own needs, problems and interests and their own voluntary assumption, through negotiations, of obligations and duties based on those needs, problems and interests. Therefore, if a successor employer agrees to arbitration under the terms of his predecessor's labor agreement, his undertaking, being voluntary, will necessarily contribute to the avoidance of

20. The late Dean Shulman, in his treatise, *Reason, Contract and Law on Labor Relations*, 68 Harv. L. Rev. 999 (1955) stated:

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a system of self-government created by and confined to the parties." *Id.*, at 1016.

21. While *Burns* dealt with Board-ordered compulsion, it is clear that the policy expressed in *Burns* extends to court-ordered compulsion as well. Even the *Wiley* court rejected the contention that a federal court could properly compel a successor to agree to the substantive terms of the predecessor's agreement. The AFL-CIO as *amicus curiae* in *Wiley* urged the court to adopt such a rule. Brief for AFL-CIO as *Amicus Curiae*, at pages 8-22, *Wiley supra*. The Court, of course, did not so rule.

labor disputes. On the other hand, forcing an employer to order his affairs according to a contract not geared to his needs and problems and not voluntarily entered into by him is contrary to the basic premise underlying arbitration and the free collective bargaining process of which it is a part. Rather than contributing to the construction of a productive bargaining relationship, such compulsion tends to obstruct such a relationship because of the future effect of an arbitration award on the relationship.

Arbitration serves as precedent for the parties in that an award governs the future treatment by the employer of the employment condition involved in the arbitration, *i.e.* a decision interpreting a given provision of an agreement contrary to the employer's contention requires the employer to alter the practice which gave rise to the dispute in accordance with the arbitrator's interpretation as to the proper practice called for under the disputed contractual provision. Thereafter, the employer must continue, until the contract expires, to govern his affairs with respect to the subject matter of the dispute in the manner defined by the arbitrator. In the successorship situation, the successor employer is no more free to ignore this precedential effect of an arbitration award as is the employer in the traditional arbitration case. The successor must implement the practice called for by the award. The implementation of the arbitrator's decision thereby becomes an employment condition which governs the parties' relationship with respect to that condition. Their future freedom to order their relationship with respect to that matter in a way that reflects the needs of the new relationship is, to that extent, precluded. A relationship based on compulsion rather than on freedom of the parties to make necessary adjustments reflective of their needs certainly does not contribute to the avoidance of industrial strife. The lingering effect of *Wiley* is to compel the creation of such relationships—relationships which do not have the enduring basis upon which stability is built and strife is avoided.

2. The Obligation Imposed on a Successor by Burns Comports with the Objectives of Congressional Policy as Expressed in the Act.

In giving effect to the Congressional policy favoring contractual freedom, this Court has realistically understood that the best means for achieving stability in employer-union relationships and thereby preventing industrial strife is through the give and take process of bargaining, not on judicially imposed obligations unrelated to the realities of the parties' new situation. In *H. K. Porter, supra,* the Court stressed that Congress was aware that the Act could not in all cases ensure against the industrial strife and work stoppages that often result from labor disputes. In balancing the interests favoring preventing such disruptions by compelling parties to reach agreement or by providing for contractual liberty, Congress chose the latter, recognizing that stability in industrial relations can only result if the parties have the freedom to order their relationship according to their own needs and strengths. Indeed, this Court's decision in *Porter* is premised on Congress' desire that parties' freedom to order their own industrial destinies shall not be compromised by imposed solutions to their problems which they have not knowingly and voluntarily undertaken. The decision in *Burns* is a necessary corollary.

Further, in the successorship situation, stability is achieved by encouraging the continuation of an on-going business and, to the extent possible, retention of the work force. Certainly, any policy which discourages employers from taking over failing businesses does a disservice not only to the employers involved but to the employees and the union as well; if a failing employer is unable to find a successor, the net result is the loss of jobs for all the employees.

Removing the shackles of forced contractual obligations encourages an employer to take over such enterprises since they can then be managed in a competitive and business-like man-

ner.[22] *Wiley* retains those shackles and thus discourages such efforts. Similarly, the freedom from prior contractual obligations also gives the union the necessary flexibility to meet the needs of the new bargaining relationship and reorder the parties' relationship to the advantage of its employee-members.[23]

Moreover, *Burns* is based on the very premise that underlies the entire Act, i.e., the obligation of an employer to bargain stems from the collective choice of a majority of *its* employees. It is the rights of the employees, after all, that the Act seeks to protect, and *Burns* protects those legitimate rights. Under *Burns*, a successor employer is obligated to bargain with the union if a majority of its employees were employees of the predecessor, or have in some manner—as through Board certification—expressed their desire to be represented by the union. The employees may receive better terms and conditions of employment under a new contract than they enjoyed under the predecessor's. Of course, they may not. But, in balancing the rights of all concerned, *Burns* recognizes that given the economic realities of the business world, the protections of the Act cannot guarantee more than the right to require the employer to bargain in good faith. If the employer cannot economically meet the demands of the union even arbitration cannot compel it to do so.

Finally, the *Burns* rule accords due consideration to the legitimate rights of employees. First of all, an employee has no right to continuing employment with the successor, and he or she, therefore, has no rights attendant to the employment

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22. "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, and nature of supervision. Saddling such an employer with terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and discourage and inhibit the transfer of capital." *Burns, supra,* at 288.

23. "On the other hand, a union may have made concessions to a small and failing employer that it would be unwilling to make to a large or economically successful firm." *Ibid.*

relationship.[24] An employee not hired by the successor may have outstanding claims or grievances against the predecessor, but that employee is protected against the predecessor's failure to resolve the matter since the predecessor is obliged under the Act to bargain with the union over the effects of going out of business. *General Motors Corp.*, 191 NLRB No. 149 (1971).[25] Further, if the successor should refuse to hire an employee of the predecessor in order to defeat the union's majority, such conduct would constitute a discriminatory refusal to hire in violation of Section 8(a)(3) of the Act.[26] Those employees of the predecessor whom the successor does hire have the same protection under the *General Motors* case, *supra*, to require the *predecessor* to remedy outstanding grievances, but as clearly set forth in *Burns*,[27] the obligations imposed under the predcessor's contract do not devolve on the successor, and it is free to set its initial terms and conditions of employment, subject to the obligations to bargain.

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24. "[From the Board's contention] It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor." (footnote omitted) *Burns, supra*, at 289, rejected the proposition that a successor employer is so obligated.

25. While it may be argued that the protection afforded under the Act in this regard may not in every instance be adequate since the predecessor, having gone out of business, may be bankrupt or in some manner judgment-proof, the law can never guarantee that a judgment will be collected. However, the Board has gone to great lengths to finally recover judgment in pursuit of its decisions. See, *e.g.*, *N. L. R. B.* v. *Deena Artware, Inc.*, 310 F. 2d 470 (CA 6, 1962), where the Board persevered for ten years in order to secure employees' monetary entitlement.

26. So also, is the successor required to remedy the unremedied unfair labor practices of its predecessor of which it had knowledge. *Golden State Bottling Co.* v. *N. L. R. B.*, 94 S. Ct. 414 (1973).

27. See footnote 24, *supra*.

If, on balance, this Court felt that the policy favoring contractual freedom did not equitably protect the rights of all concerned and effectuate overall Congressional design, *Burns* would have struck a balance that did not so clearly conflict with the logic and policy considerations of *Wiley*. However, *Burns* does reject *Wiley and* compels that it be overruled.[28]

II.

AN EMPLOYER DOES NOT BECOME A SUCCESSOR, AND THE OBLIGATIONS OF SUCCESSORSHIP DO NOT MATURE UNLESS AND UNTIL A MAJORITY OF THOSE PERSONS HIRED BY THE EMPLOYER ARE EITHER FORMER EMPLOYEES OF THE PREDECESSOR OR MEMBERS OF THE UNION.

Even if this Court should find that *Wiley* and *Burns* can be accommodated and that a successor employer may be compelled to arbitrate matters arising under the terms of the predecessor's labor agreement, the standard for determining when

28. It appears to the *Amicus* that the only possible respect in which *Wiley* might survive *Burns* is with regard to grievances of employees of the predecessor who are subsequently hired by the successor if those grievances resulted from conduct occurring prior to the sale of the business and if the grievance is of the type that cannot be remedied by the predecessor. Certainly, the successor is under no obligation to arbitrate the grievance of an individual whom the successor never employs and which arose from an employment relationship in which the successor played no part. Further, the successor should be under no obligation to arbitrate with respect to a matter which arose prior to the change in ownership and which can be remedied by the predecessor, *e.g.*, a monetary award. However, even with respect to the grievance of an employee whom the successor hires and which arose prior to the successor's takeover of the business and which cannot be remedied by the predecessor, it is doubtful that the successor can be compelled to arbitrate that matter without doing violence to the teachings of *Porter* and *Burns, supra*. Since, as a result of the arbitration, the successor could be compelled to honor the terms of the predecessor's agreement and because of the consequent precedential effect of such arbitration on the successor's freedom to establish his own initial employment terms through bargaining, *Wiley* cannot readily be accommodated with *Burns* even in this limited respect.

an employer becomes a successor and thus when his obligations, either to arbitrate or merely to bargain, mature should be the same irrespective of whether the question is raised in a Section 301 suit or a Board proceeding. The Sixth Circuit below found the Petitioner to be a successor despite the fact that a majority of the Petitioner's work force were never employed by the predecessor nor were members of the union, nor in any manner expressed their desire to be represented by the union. The Sixth Circuit's finding of successorship under this circumstance is contrary to settled law and sound policy and cannot be maintained.

A. Continuity of Majority Status Among the Labor Force Is a Necessary Element to the Establishment of Successorship Status; Neither the Board Nor the Federal Courts, in Either Proceedings to Enforce Board Decisions or Suits to Compel Arbitration, Find an Employer to Be a Successor When This Element Is Not Present.

The successorship doctrine, tracing back over thirty years, is of Board origin.[29] As the criteria for determining the existence of successorship status developed under Board law, although the Board has held that no one factor is determinative, one factor has been virtually indispensible to the finding of successorship—a majority of the new employer's work force must have been employed by the predecessor and represented by the union which claimed majority status.[30] In *Burns* this Court recognized con-

29. See *N. L. R. B.* v. *Colten*, 105 F. 2d 179 (CA 6, 1939).

30. "Of fifty-nine cases decided by the Board in the past twenty years in which the question of successorship for bargaining purposes was presented, in fifty-one the alleged successor had a work force composed of a majority of employees who had worked for a unionized predecessor. In all but four of these the Board found the new employer to be a successor for bargaining purposes. The presence of a majority of such employees virtually guarantees that the Board will find the new employer to be a successor.

The converse is even more well settled: an employer, a majority of whose work force is not composed of persons em-

tinuing majority representation as a necessary element of successorship status:

> "Burns' obligation to bargain with the union over terms and conditions of employment stems from its hiring of Wackenhut's employees and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer." *Burns* at 270.[31]

And, in cases following *Burns*, the Board has continued to require the element of continued majority representation.[32]

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ployed by its predecessor, will not be found a successor for bargaining purposes. Over the same twenty year period, the Board found a new employer to be a successor only twice in such circumstances, and the later finding was reversed by the Court of Appeals for the Ninth Circuit, whose opinion the Board has subsequently cited with approval." Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw. U. L. Rev. 735, 794-95 (1969).

The case referred to by Professor Goldberg, reversed by the Ninth Circuit, is *N. L. R. B.* v. *John Stepp's Friendly Ford*, 338 F. 2d 833 (CA 9, 1964), cited with approval by the Board in *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968) and *Federal Electric Corp.*, 107 NLRB No. 63 (1968).

The second case in which the Board found successorship despite the absence of a majority of the predecessor's employees was *Firchau Logging Co.*, 126 NLRB 1215 (1960). However, in *Firchau* the employer hired 30 of 62 of the predecessor's employees, and at the time of the union's demand for recognition, which was made during the certification year, the union demonstrated its continued majority status through 43 union authorization cards.

31. The Court's citation to decisions of the Courts of Appeals is omitted. Those cases, and others, clearly establish that the Courts of Appeals have found the element of majority status necessary to enforce the Board's bargaining orders on "successors."

32. See, e.g., *Parkwood IGA*, 201 NLRB No. 141 (1973); *Hecker Machine, Inc.*, 198 NLRB No. 161 (1972); *Howard Johnson Co.*, 198 NLRB No. 98 (1972); *Crotoan Service Corp.*, 200 NLRB No. 97 (1972); *Milwaukee Engine & Equipment Corp.*, 198 NLRB No. 56 (1972).

Further, the Circuit Courts, following *Wiley*, have considered the element of hiring of a sufficient number of the predecessor's work force to constitute a majority of the new work force an essential factor in establishing the continuity of enterprise necessary to impose the obligation to arbitrate on the new employer in Section 301 suits.[33]

Clearly, there is no basis in precedent, either under Board proceedings or actions under Section 301, for finding successorship status when the element of majority status among the new employer's work force is not present. The obligation to bargain with a union, of which arbitration is "part and parcel", is founded upon the principle that a majority of the employer's employees have selected the union to bargain collectively for them.[34] If the union does not represent a majority of the employer's employees in an appropriate bargaining unit, the employer is under no obligation to bargain with the union. Indeed, if a successor employer recognizes and bargains with a union which only represents a minority of employees in an appropriate unit, the

33. See eg., *Wackenhut Corp.* v. *United Plant Guard Workers of America*, 332 F. 2d 954 (CA 9, 1964); *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 801 (CA 3, 1964);*United States Gypsum Co.* v. *United Steelworkers*, 384 F. 2d 38 (CA 5, 1967), *cert. denied* 389 U. S. 1042 (1968). Indeed, the only Section 301 case that the Sixth Circuit could find where the element was not present was *Monroe Sanders Corp.* v. *Livingston*, 377 F. 2d 6 (CA 2, 1967). However, that case involved a transaction between a parent and subsidiary corporation whereby the parent terminated one subsidiary plant and purchased another. In *Printing Specialties Union No. 447* v. *Pride Papers Aronson Bros. Paper Corp.*, 445 F. 2d 361 (CA 2, 1971), the Second Circuit, as a result of its *Burns* decision, 441 F. 2d 911 (1971), upheld by this Court, distinguished *Monroe Sanders*, and found the new employer not to be a successor when the new employer did not hire a majority of the former employer's employees.

34. Section 9(a), 29 U. S. C. Section 159(a) provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . "

employer commits an unfair labor practice.[35] To require a successor employer to recognize a minority union and arbitrate a dispute with that union is contrary to the basic principles of the Act.

B. The Time for Determining Majority Status Among the Work Force Is When the Employer Has Hired Its Full Complement of Employees.

After determining that a new employer's obligation to bargain requires majority representation among its employees, this Court in *Burns* considered the question of when the obligation matures. The Court held that only when it is "perfectly clear" from the outset that the employer intends to hire all of the prior employer's employees in the bargaining unit does it have an obligation to bargain prior to establishing terms of employment.

> "In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he had a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of employees in the union as required by Section 9(a) of the Act, 29 U. S. C. Section 159(a)." *Burns, supra,* at 295.

Since, as set forth above,[36] a finding of successorship requires that a majority of those hired by the new employer must have been employed by the predecessor or be union members, then in light of the above statement in *Burns*, it necessarily follows that successorship status does not mature until the union's representative status can be ascertained, *i.e.*, when the full employee complement is hired, unless, of course that determination can be made from the outset, at the time of change of ownership.

However, a new employer who purchases a moribund business and who plans to retain all or a sufficient number of the prede-

35. *Illinois Malleable Iron,* 120 NLRB 451 (1958).

36. Part II, Subpart A, *supra.*

cessor's employees in the unit should nonetheless be accorded considerable freedom to unilaterally vary employment conditions. To unduly restrict an employer's ability to make initial adjustments necessary to convert a marginal business to a profitable one will discourage the purchase not only to the disadvantage of the predecessor but also to his employees. Extended negotiations, perhaps leading to impasse, would certainly hinder putting the business in good order and would not likely result in any benefit to the employees. The benefits to be derived from allowing a reasonable period for employment conditions to be unilaterally adjusted to business needs are substantial, even though an employer initially hired a sufficient number of the predecessor's employees to constitute a majority of his own labor force. Studies and analyses are often necessary before the employer is able to determine what changes in production method or product lines must be made in order to put the business on a profitable basis. Changes in production technique, practices, discontinuation of certain processes or the addition of new ones might be required as a result of such studies. More often than not these production changes necessitate some alteration in employment conditions or other restructuring of the business enterprise. While the employer is in the process of evaluating such business modifications, the work force is operating under the conditions that existed prior to the successor's takeover of the business. If the successor must bargain with the union over changing these pre-existing conditions, he is handicapped in turning the business around and making it viable. If on the other hand he is permitted to make such changes not only is the successor's interest in making the business profitable served, but the employees are benefitted to the extent that the employer is a more secure and stable entity.[37]

37. In *N. L. R. B.* v. *Wayne Convalescent Center*, 465 F. 2d 1039 (CA 6, 1972); the Sixth Circuit recognized the wisdom of according such freedom in interpreting *Burns*. In that case the new employer took over the operations of a nursing home shortly after a union was certified as the representative of the home's employees and before a collective bargaining agreement was executed. Wayne, the

CONCLUSION.

For the foregoing reasons and those urged by the Defendant, it is respectfully urged that this Court reverse the decision of the Court below and in so doing overrule *Wiley*.

Respectfully submitted,

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new employer retained substantially all of its predecessor's employees and the operations of the home continued uninterrupted. Wayne was clearly a successor as the Board and courts have defined the term. Approximately one month after assuming operations, Wayne changed employment conditions without consulting with the union which represented the predecessor's employees. The Sixth Circuit, noting that it was not clear at the time of the change whether Wayne was going to convert the nursing home to a bed and board facility requiring the retention of but a few of the predecessor's employees, concluded that the changes "were merely initial terms of employment established by Wayne." A contrary holding such as the Seventh Circuit rendered in *Bachrodt Chevrolet Co.*, 186 NLRB No. 151 (1970), *enforced in part*, 486 F. 2d 963 (CA 7, 1972), *vacated and remanded*, 411 U. S. 912, 205 NLRB No. 122 (1973) eliminates the important benefits to be derived from allowing for a reasonable period of time for justifiable business adjustment and modification.

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Supreme Court of the United States

October Term, 1973

No. 73-631

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED[1]

1. Did the courts below err in holding that a company which purchases the assets of an employer and continues without interruption to operate at the same location, a business which provides the same products and services to the same class of customers, with a workforce of almost identical size, is a "successor" for purposes of an action under § 301 to enforce a promise to arbitrate in a contract

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[1] Respondent accepts Petitioner's statement of the opinions below, jurisdiction, and the statutes involved.

between the original employer (the seller) and a union, even though the purchaser chooses to retain substantially less than a majority of the seller's employees?

2. If the answer to the first question is that the courts below were correct in holding that such a purchaser is a "successor," did those courts err in holding further that the "successor" is required to arbitrate pursuant to the arbitration provision of the contract between the original employer and the union, the extent, if any, of the "successor's" obligations under that contract?

STATEMENT OF THE CASE[2]

A. The Facts On Which The Union's Claim Is Based.

This case was decided on the basis of a stipulation of facts. In its Memorandum Opinion the District Court set out a resume of those facts, (Pet. App. 13a-15a), which we shall, except as indicated in footnotes, adopt as our own.

The Howard Johnson Motor Lodge and the Belleville Restaurant were owned and operated by two corporations controlled by the Grissom family (hereafter referred to as "Grissoms").[3] Grissoms operated these businesses under franchising agreements entered into with Howard John-

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[2] Throughout this brief "A." will refer to the Appendix in this Court; "Pet. App." will refer to the Appendix to the Petition for Certiorari which contains the opinions and orders of the courts below.

[3] The District Court referred to the Grissom family and the corporations which it controlled as "Grissom." In order to preserve uniformity with petitioner's brief, we shall throughout refer to them as "Grissoms." We shall alternatively refer to Howard Johnson Co., Inc., the petitioner herein, as "the Company" or "Howard Johnson."

son Company, Inc., a Maryland corporation, on December 12, 1959 and August 18, 1960.

The 1959 "License Agreement" involves the franchising of the Howard Johnson Motor Lodge and is a strikingly comprehensive and stringently controlling document; for example, the Agreement provides that the Company shall determine and approve standards of construction, operation and service; that Company supervisory shall have the right to enter the premises at any reasonable time for that purpose; that approval must be obtained for furniture, utensils, stationery, supplies, etc., bearing the "Howard Johnson" trade name; that repairs and painting will be done at the reasonable behest of the Company; that the licensee will not seek to employ any persons employed by another franchisee; that certain insurance is to be carried; that the licensee give the Company the first option to purchase in the event of a contemplated sale and in the event the Company declines to purchase, the successor must be approved by the Company.

The restaurant "Operator's Agreement" is of identical import with the added feature of the requirement that the franchisee purchase from the Company all supplies or products manufactured or sold by the Company which the franchisee may need for use or sale at the restaurant.

In pursuant of said agreements, Grissoms operated the Motor Lodge and Restaurant and entered into collective bargaining agreements with the Union as the certified representative of the employees at both businesses. These agreements provide, among other things, that grievances shall be resolved by Arbitration (Exhibit A, Article IX,

Exhibit B, Article III)[4] and that the agreements shall be binding up on the "successors, assigns, purchasers, or transferees" of Grissoms (Exhibit A, Article XVIII, as to Motor Lodge Employees).[5]

Subsequently, Grissoms entered into negotiations for the sale, transfer and lease of its holdings[6] in the two busi-

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[4] See A. 89a-90a, 99a-100a. The text of the arbitration provision of the hotel agreement the restaurant agreement does not differ materially) is as follows:

"ARTICLE IX

"GRIEVANCES—ARBITRATION

"*Section 1.* If an employe has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set-forth:

"*Step 1.* The aggrieved employe or the Union shall take the grievance up with his department head.

"*Step 2.* If the grievance is not settled under Step 1, the aggrieved employe shall take the grievance up with the local Union who shall attempt to adjust the matter with Management..

"*Step 3.* If the grievance cannot be settled by Step 2, it shall be presented by the Union to the Employer who shall make a decision in two (2) weeks. If the decision of the Employer is unacceptable either to the Union or to the Employer, either party shall have the right to demand arbitration in accordance with the following step.

"*Step 4.* The arbitrator shall be selected from a list furnished by the American Arbitration Association within two (2) weeks after such list is furnished to the parties. Upon the appointment of an arbitrator selected from a list furnished by the American Arbitration Association, the subject matter of the grievance shall be submitted to the arbitrator within five (5) days after the selection of the arbitrator unless the parties mutually agree upon a longer period of time. Evidence shall be submitted by both parties within ten (10) days thereafter. The decision of the arbitrator shall be final and con-

nesses to the Howard Johnson Company and on June 16, 1972, an Agreement was executed by the respective parties which called for an effective cessation date and time of July 23, 1972, at 11:59 P.M. That is, that the Company would assume the operation of both businesses pursuant to the Agreement, as of 12:01 A.M., July 24, 1972.

On June 28, 1972, the Company mailed to Grissoms an amendatory letter which provided that the Company would not recognize and assume any labor agreements then extant. Grissoms signed an acknowledgment and confirmation on July 11, 1972.

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clusive upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties. Failure of the parties to agree upon an arbitrator within the period of time set-forth above shall give the employe the right to strike to solve unsettled grievances.

"*Section 2.* An arbitrator shall not have any right or authorization to add to, subtract from or modify the terms and provisions of this Agreement. Further, the extension, modification or amendment of this Agreement shall not be the subject matter of any grievance or arbitration procedure."

[5] A. 93a; see also A. 108a-109a, Art. XIII as to restaurant employees.

[6] The Sales Agreement provided that the Company would purchase from the Grissoms for the price of $10.00:

"Chattels, fixtures, furniture, furnishings, equipment, machinery, appliances, implements, utensils, silverware, china, linen inventory and all other personal property belonging to the Sellers and located in, or used in connection with a Howard Johnson's Motor Lodge located at 45945 Willow Run Expressway, Belleville, Michigan, and a Howard Johnson's Restaurant located at 45915 Willow Run Expressway, Belleville, Michigan or property more particularly described in Schedule I and II

On July 9, 1972, Notices to Employees of both businesses were posted advising of the termination of employment as of Midnight, July 23, 1972. Some personal contact between the Company and the Union commenced on July 11, 1972.[7] On July 13, 1972, registered mail notices were sent to the Union advising of the termination of business by Grissoms at the aforesaid date and time.

The Company began interviewing prospective employees on July 10, 1972, and hired the first employee on July 18, 1972. It commenced training of employees on July 20, 1972, at another location.

The Company commenced operation at both businesses

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annexed hereto and made a part hereof, and the appurtenances thereof and thereto, respectively in the above mentioned and described premises, on the following terms and conditions." (A. 40a)

[7] The conversation between the representatives of the Union and the Company was described by Company counsel as follows:

"On July 11, 1972, a Mr. Robert Corrigan—who I believe is a representative of the plaintiff Union—had a telephone conversation with a representative of my client. And Mr. Corrigan was advised that Howard Johnson Company would not recognize any collective bargaining agreement with the Union for either the Restaurant or the Motor Lodge. The wording was, 'The Howard Johnson Company does not accept or recognize any alleged contracts for either the Restaurant or the Motor Lodge or any successor clauses contained therein. It will not recognize the Union as the bargaining representative for the Restaurant or Motor Lodge unless or until it is certified by the National Labor Relations Board as the bargaining representative of employees in an appropriate union.'

"I am further advised that Mr. Corrigan stated that he understood the position of the Company and stated, "It looks like we have trouble." (A. 27a)

at 12:01 A.M., July 24, 1972 with 55 employees; of those 33 were engaged in the Restaurant and 9 of them were former Grissoms employees. None of the supervisory personnel of Grissoms were retained by the Company. The number employed by Grissoms at the time of the changeover was 53.

B. The Proceedings Below.

Having been rebuffed by Howard Johnson, the Union brought this suit to complete arbitration under § 301 of the Labor Management Relations Act of 1947 (hereafter "the Act") against the Grissoms and Howard Johnson. The action was commenced in the Circuit Court of Wayne County and was removed by the Company to the United States District Court, Eastern District of Michigan. The District Court (Philip Pratt, J.), concluded that Howard Johnson was a successor, as that term has been understood in the § 301 law, and that it was under a duty to arbitrate with the Union. In its opinion the court explained the scope of the relief it would grant.

> "Thus, this order to arbitrate does not contemplate that it be tantamount to an order that the Company honor the collective bargaining agreement. Rather, it is emphasized, it is an order based on Section 301 and in conformance with the direction of *Burns* which is contained in the following language:
>
> '[*Wiley* held only that] the agreement to arbitrate, survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by *other provisions of the contract.*' 40 U.S.L.W. at 4503. (emphasis supplied [by District Court])." (Pet. App. 22a-23a)

And, thereafter, the District Court did enter an order to arbitrate in the following terms:

> "IT IS HEREBY ORDERED that Defendants, Howard Johnson Company, Inc. and Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., arbitrate with Plaintiff, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, issues arising under the collective bargaining agreements between Plaintiff and Defendants, Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., effective January 1, 1968 and August 1, 1968, respectively, relating to the obligation and liability of Defendants to Plaintiff and to the employees represented by Plaintiff under the provisions contained in the aforesaid agreements pursuant to the Memorandum Opinion of the Court issued on August 22, 1972." (Pet. App. 27a-28a)

That order denied the Union's motions for a preliminary injunction requiring the Company to hire or reinstate the former Grissoms employees who had been terminated, and for a remand of the case to the state court. Pet. App. 28a.

Howard Johnson alone appealed. The Court of Appeals for the Sixth Circuit unanimously affirmed the District Court's judgment in an opinion by Circuit Judge William E. Miller. Pet. App. 1a-12a.

SUMMARY OF ARGUMENT

I

In the instant § 301 suit, the Union obtained a court order requiring Howard Johnson to arbitrate the extent, if any, to which the Company is bound by the collective agreement between the Union and Grissoms in force at the time Johnson bought out Grissoms. That is the precise form of order issued in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, which was also a § 301 case brought to enforce an arbitration clause over a change in ownership.

Wiley holds that for such an order to issue there must be "substantial continuity of identity in the business enterprise before and after the change [in ownership]." (376 U.S. at 551.) That condition is satisfied here; indeed, the indicia of continuity are far more compelling in this case than in *Wiley*. This is a case "in which one owner replaces another but the business entity remains the same." (*Id.* at 550.) Before and after the change, and without any interruption, the employing enterprise was a Howard Johnson Motel and Restaurant providing the same class of customers the same goods and services, with a workforce of the same size and at the same facility.

The Company, which refused to hire more than a fraction of the prior workforce, argues that the foregoing indicia of continuity are insufficient on the ground "that the *sine qua non* for successorship is * * * [that] the prior owner's employees * * * [constitute] a present majority of the new employer's labor force." (Co. Br. 8.) That contention is flatly inconsistent with what was actually decided in *Wiley*. There too, the former owner's employees were a

minority of the new workforce. (376 U.S. at 545, 550-551, n. 5.) And as the court below well stated:

> "Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire, a majority of Grissoms' employees. (Pet. App 7a.)

Accord: *Monroe Sander* v. *Livingston*, 377 F.2d 6, 12 (C.A.2).

The Company says that its position coincides with the Board law of successorship under § 8 of the Act, as stated in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 277-282, and that that law must be carried over into § 301. But the standards the Board had developed for successorship in cases like *Burns* were directed to answering a different question, *viz.*, whether the alleged successor has a duty to bargin. The requirement that the Union be the representative of the successor's employees for bargaining purposes stems directly from § 9(a) of the Act to which § 8(a)(5) is subject. On the other hand, this Court has squarely held that the majority status standards of § 9(a) are not relevant in a suit to enforce a contract under § 301. *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, followed in *Wiley*, 376 U.S. at 551-552, n. 5.

II

The Company argues (Co.Br. 34-42) that even if it is a successor it cannot be required to arbitrate with the Union. Here again, the Company relies on *Burns*, and again fails to appreciate that the holding of that case was dependent upon the question there presented.

In *Burns*, the Board unsuccessfully argued, in reliance on *Wiley*, that a successor who has a duty to bargain is also required by § 8(a)(5) to adopt his predecessor's collective bargaining agreement. This Court, however, distinguished between the obligation to honor contracts imposed by § 301 and the duty to bargain under §§ 8(a)(5) and 8(d). The latter does not entail a duty to agree, and indeed, § 8(d) is an "express statutory mandate," (*Burns*, 406 U.S. at 283), to the Board not to foist agreements on the parties; but while, as *Burns* emphasized, the *making* of agreements was left to the free play of economic forces, agreements already made are binding and enforceable.

Congress deliberately committed the duty of enforcement not to the Board, in unfair labor practice proceedings, but to the courts according to "the usual processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 42). These processes traditionally include enforcement of implied obligations. (*Perry* v. *Sindermann*, 408 U.S. 593; *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 111 N.E. 214 (Cardozo, J.).) That method of interpretation is familiar in suits under § 301, (e.g., *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95), and was utilized in deriving from § 203(d) the "now well-known presumption of arbitrability and labor disputes" (*Gateway Coal Co.* v. *United Mine Workers*, 42 U.S.L.Wk. 4095, 4098). It was that presumption that governed in *Wiley*. 376 U.S. 550. Where a collective bargaining agreement provides for arbitration, that presumption operates to commit any dispute to arbitration unless the parties have expressly excluded it. In the present context this enables a union and an employer to exclude the obligations of a potential successor employer

from arbitration; by contrast, the rule espoused by the Board in *Burns* would have required the successor to abide by the entire contract regardless of its terms.

The limited holding of *Wiley* is significant also because the "flexible procedures of arbitration" assure the successor that the extent of his obligations wil be determined within the confines of the agreement and on the basis of the realities and equities in each particular case:

> "The NLRB in its *Burns* decision had adopted an all-or-nothing approach. If the employer was a successor then it was required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). * * * As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. * * * In arbitration proceedings as ordered below such rigidity is not present." (Pet. App. 10a-11a.)

This Court's recent decision in *Golden State Bottling Co.* v. *NLRB*, 42 U.S.L.Wk. 4039 confirms our view that successorship problems must be analyzed according to their precise statutory context. For there the Court differentiated *Wiley* and *Burns* from each other and from *Golden State*. The short of the matter is that the equation which the Company seeks to draw between *Burns* and this case is the same equation which the Board unsuccessfully pressed between *Wiley* and *Burns*. Even as *Wiley* did not control *Burns*, *Burns* does not govern this case. For this case differs from *Burns*, even as it is identical to *Wiley*.

ARGUMENT

The court below held that under the principles declared by this Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (hereafter "*Wiley*"), Howard Johnson is the successor of Grissoms, and is under a duty, enforceable under § 301 of the Act, to arbitrate, pursuant to the arbitration clause in the collective agreement between Grissoms and the Union, the extent, if any, of Johnson's substantive obligations under that contract. (Pet. App. 4a-7a.) The court below also held that that obligation to arbitrate is not affected by this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (hereafter "*Burns*"). (Pet. App. 7a-11a.) In both respects the decision below was entirely correct.

I. *WILEY* ESTABLISHES THAT HOWARD JOHNSON IS GRISSOMS' SUCCESSOR FOR THE PURPOSES OF THIS § 301 SUIT.

A. The Holding of Wiley.

Mr. Justice Harlan, speaking for a unanimous Court, described the genesis of the *Wiley* case as follows:

> "District 65, Retail, Wholesale and Department Store Union, AFL-CIO, entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. The agreement did not contain an express provision making it binding on successors of Interscience. On October 2, 1961, Interscience merged with the petitioner, John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity. There is no suggestion that the merger was not for genuine business reasons.

"At the time of the merger Interscience had about 80 employees, of whom 40 were represented by this Union. It had a single plant in New York City. Wiley was a much larger concern, having separate office and warehouse facilities and about 300 employees. None of Wiley's employees was represented by a union.

"In discussions before and after the merger, the Union and Interscience (later Wiley) were unable to agree on the effect of the merger on the collective bargaining agreement." (376 U.S. at 544-545.)

District 65 thereupon brought suit under § 301 of the Act to compel Wiley to arbitrate. This Court held that:

"[T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." (*Id.* at 548.)

That holding was "fashioned 'from the policy of our national labor laws,' • • • *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456." (376 U.S. at 548.) Its first element was recognition of "the central role of arbitration in effectuating national labor policy," (*id.* at 549):

"In [*Steelworkers* v.] *Warrior & Gulf Navigation Co.* [363 U.S. 574], 578, arbitration was described as 'the substitute for industrial strife,' and as 'part and parcel of the collecttive bargaining process itself.' It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of

removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same."

The second element of *Wiley* was that national labor policy, which permits employers to determine questions pertaining to ownership among themselves, also provides a counterbalancing protection for the legitimate interests of the affected employees, by preserving a contractual arbitration obligation despite changes in ownership, so long as the employing industry continues:

> "[The] negotiations leading to a change in corporate ownership * * * will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'" (*Id.* at 549.)

The final element of *Wiley's* rationale was that, since collective agreements are not in any case "the simple product of a consensual relationship," the national labor policy governing the duties of "successor" employers does not turn on the common-law doctrine that one who buys a busi-

ness is bound only by those agreements he agrees to assume:

> "[A] collective bargaining agreement is not an ordinary contract * * *. Central to the peculiar status and function of a collective bargaining agreement is the fact * * * that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate * * * must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (*Id.* at 550-551.)

Immediately thereafter Mr. Justice Harlan with characteristic care defined the scope of the Court's holding:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. There may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." (*Id.* at 551.)

He explained that there is *no* "lack of any substantial continuity of identity" where there is "relevant similarity and continuity of operation across the change in ownership." (*Id.*) After *Wiley* then, in cases in which

a union sues to compel arbitration with a party other than the original signatory to the collective agreement, the question is not whether that party "sign[ed] the contract being construed," but whether there is a "relevant similarity and continuity of operation across the change in ownership." When that test is satisfied the second employer's "successorship" is established, and if, as here (see pp. 4-5 n. 4, *supra*), the contract contains a broad arbitration clause, the successor's duty to arbitrate follows.[8]

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[8] At p. 22 of its brief Howard Johnson finally and grudgingly addresses itself to the *Wiley* decision "only because the Sixth Circuit below relies heavily upon it." The Company says, mistakenly and somewhat inconsistently, "that, in its holding on successorship, the Sixth Circuit did not cite *Wiley* or any other authority." (*Id.*, n. 18, compare Pet. App. 3-6). More importantly, the Company misstates *Wiley*, saying:

> "The majority status was unnecessary in Wiley, for the same employer was at all times involved, and only the rights and expectations of that employer's employees covered by the labor contract were at issue." (Co. Br. 22)

If that reading is correct, what was the successorship problem in *Wiley*? In the same vein, the Company says that "this Court was confronted with an employer who continued in existence, freely took substantially all of its former employees, and who had negotiated the contract at issue." (*Id.*) But as this Court reminded in *Golden State Bottling Co.* v . *NLRB*, ——U.S. ——, 42 U.S.L.Wk. 4039, 4043:

> "The agreement [sued upon in *Wiley*] originally had been entered into with another corporation which had subsequently merged with Wiley for genuine business reasons."

Of course, if one treats *Wiley* as if there had been only one employer throughout, that case is easily distinguishable from this. But if one reads *Wiley* correctly, and the Company's reading is not even arguable, the Union is plainly entitled to an order direct-

B. Howard Johnson Is Grissoms' Successor

1. As *Wiley* recognized, changes in ownership take many forms, and the degree of continuity over the change will, of course, vary. The nature and degree of continuity required to make one employer the successor of another also vary with the context of the inquiry. (See pp. 24-30, *infra*.) The *Wiley* opinion recognized that in some situations a purchase or merger would not result in a successorship for purposes of § 301 because the business was acquired not to operate it but to dispose of it. (376 U.S. at 551.) But it is not necessary in this case to determine where the line is to be drawn for purposes of § 301, if indeed the problem lends itself to resolution through a simple formula. Here there is unmistakably the "substantial continuity of identity of the business enterprise" required in *Wiley* (376 U.S. at 551), since this case is an instance in which "one owner replaces another * * *, [while] the business entity remains the same," (*id.* at 549), in the sense that the factors that set the parameters of labor-management relations are unchanged. Indeed, when the facts in this record are compared with the surrounding circumstances stated in the *Wiley* opinion, the conclusion of successorship reached in *Wiley* follows *a fortiori* in this case:

• Here there was a sale of assets to a purchaser which already had a substantial voice in the operation of the busi-

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ing Howard Johnson to arbitrate the scope of its obligations to the Union and the employees it represents under the agreement between the Union and Grissoms. And, again contrary to Co. Br. 22, that is all that the judgment below does; it does not "apply the former contract to the entire labor force." See Statement, p. 8 *supra*, quoting the District Court's Judgment, which the Sixth Circuit affirmed.

ness; in *Wiley* there was a merger with a former stranger to the enterprise. In Mr. Justice Harlan's view, the case for successorship was, if anything, less strong where "the contracting employer disappears into another by merger" than where "one owner replaces another." (376 U.S. at 549.)[9]

• Here the enterprise continued without interruption to provide the same services and products to the same class of customers; the *Wiley* opinion is silent as to the extent to which *Wiley* continued to publish the Interscience line.

• Here the operation of the business continued at the same location and indeed, in the same physical plant; in *Wiley* the former Interscience operation was brought into the *Wiley* plant.

• Here the business was continued by a complement of almost the exact size, which retained its identity separate and discrete from all other employees of Howard Johnson or its franchisees; in *Wiley* the Interscience workforce was integrated into the substantially larger Wiley workforce, and the opinion is silent as to the number of people who carried on what had been Interscience's work.

2. Each of the salient features of the relationship between Grissoms and Howard Johnson demonstrates "relevant similarity and continuity of operation across the

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[9] The Company suggests (Co. Br. 22) that since *Wiley* arose against the background of New York corporation law, which imposes certain obligations on the surviving corporation in a merger, its holding does not govern in assets acquisitions. But this Court has recently explained that this is not correct. *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4043-4044, n. 5. See also, Pet. App. 7a, n. 10.

change in ownership." (376 U.S. at 551.) And *Wiley* holds that a successorship will be found unless there is a "lack of *any* substantial continuity of identity." (*Id.*, emphasis added.)[10] Yet, Howard Johnson argues "that it is a prerequisite to successorship that a majority of the new employer's

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[10] The Company says:

> "Surely, such factors as hiatus and purchase of certain operational assets could easily be different. Petitioner could have purchased dishes, linen and the like elsewhere, or kept the facilities closed for a period of time. So important a matter as employer-employee relations should not depend upon factors so tangential to the employment relationship." (Co. Br. 24, n. 25.)

But continuation of a business without interruption (that is, without "hiatus") is very strong, if not the strongest possible evidence of *continuity* in the employing industry. And the circumstance that "dishes, linen and the like" (*id.*) were purchased, which demonstrates, that the purchaser would perform the same function, (that is, operate a restaurant and motel), and that the same work would be performed, is far from "tangential to the employment relationship." Indeed, these factors show that the business would continue to be the operation of a *Howard Johnson* restaurant and a *Howard Johnson* motel, rather than, for example, a Holiday Inn restaurant and motel. For the Company painstakingly understates the "certain operational assets" which it acquired. The sales agreement provided that Howard Johnson would buy from Grissoms "chattels, implements, utensils, silverware, china, linen inventory and all other personal property belonging to the Sellers and located in, or used in connection with" Howard Johnson's Motor Lodge and the Howard Johnson's restaurant at these locations (A. 40a), which the Company contemporaneously agreed to lease (Pet. App. 14a). The total purchase price was $10.00. (*Id.*) That nominal amount is symptomatic of the prior franchisee/franchisor relationship between these parties, whereunder Johnson had the power to approve all furnishings, supplies, etc., used at the restaurant and the motor lodge, and required the purchase of some supplies directly from Howard Johnson. (Pet. App. 14a; A. 50-51, 61.)

labor force consist of employees of the former employer." (Co. Br. 15.)

That contention is flatly inconsistent with what was actually decided in *Wiley*. As we have already noted, the former Interscience employees were a ***minority*** of the new Wiley workforce. And the Court squarely confronted the contention, made by Wiley, that requiring it to arbitrate with the union would be inconsistent with the provisions of the National Labor Relations Act dealing with the selection of bargaining representatives and the duty to bargain:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633*, v. *Lion Dry Goods, Inc.*, 369 U.S. 17. There is no problem of conflict with another union, cf. *L. B. Spear & Co.*, 106 N. L. R. B. 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees.
>
> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because for rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." (376 U.S. at 551-552, n. 5).

The court below was merely following this Court's lead when it rejected Howard Johnson's contention:

> "Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, at least in this § 301 action. Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees. Also to adopt the position urged by Howard Johnson would make the employees' jobs completely contingent on the employer's desire either to retain or to disregard the collective bargaining agreements. If Howard Johnson sought to retain the agreement negotiated by Grissoms, it would hire a majority of Grissoms' employees. If, on the other hand, it wished to disregard the collective bargaining agreement, it would simply hire none or at best only a few of the former employees. The decision whether to hire the predecessor's employees should turn upon other and more relevant considerations." (Pet. App. 7a)

And both the reasoning and result reached below are in accord with the only other Court of Appeals decision under § 301 in which an employer argued that notwithstanding other indicia of "continuity of identity" there can be no finding of successorship where the second employer refused to retain the prior employees. In *Monroe Sander* v. *Livingston*, 377 F.2d 6 (C.A.2), the court stated:

> "Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of opera-

tions. *Wiley*, 376 U.S. at [551], 84 S. Ct. 909. In this case, Sander's offer of preferential hiring was some evidence to that effect. Furthermore, there was other adequate evidence of identity of operations. Moreover, the failure to hire Sander employees in New Jersey could not be determinative where, as here, that failure is the nub of the dispute." (377 F.2d at 12).

Thus, there are no decisions which have read *Wiley* to require a continued employee majority.[11] As the Second Circuit appreciated, *Wiley's* reference to the retention of

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[11] Howard Johnson contends (Co. Br. pp. 17-20, 28) that *Printing Specialties Union No. 477* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361 (C.A.2), and *Boeing Co.* v. *International Ass'n. of Machinists & A. Wkrs.*, 351 F. Supp. 813 (M.D. Fla.) appeal pending, C.A.5, No. 73-1051, are such cases. We disagree.

In *Pride Papers* the Second Circuit concluded that where an individual sells his business and then utilizes the proceeds to buy into a separate going concern there is no evidence of "continuity in the business operation" (445 F.2d at 363-364); and it distinguished *Monroe Sander* on the ground that the latter was a case in which "continuity was evidenced by many factors," (*id.* at 364, n. 1). Thus, *Pride Papers* is consistent with the holding of *Monroe Sander*, *viz.*, that in a § 301 case where there is other evidence of continuity a refusal to hire the predecessor's employees does not preclude a finding of successorship. Moreover, the actual holding in *Pride Papers* was that even if the second employer had been a successor, the *Wiley* principle would not be applicable: first, because the union was not seeking arbitration; and, second, because there was at the new plant another union which represented all of the employees under an existing collective bargaining agreement. (*Id.* at 364) On the latter point the Second Circuit followed its own decision in *McGuire* v. *Humble Oil Refining Co.*, 355 F.2d 352 (C.A. 2), cert. denied 384 U.S. 988, which held that in that circumstance the duty to arbitrate does not survive, thereby resolving a question anticipated but not decided in *Wiley* (376 U.S. at 551-552, n. 5). Finally, the *Pride Papers* case followed the earlier Second Circuit

Interscience's employees did not establish a test of successorship, much less an overriding condition for a successorship finding, but described a circumstance which "adequately evidenced * * * relevant similarity and continuity of operations." (376 U.S. at 551.) Retention on a voluntary basis of the former employees by an employer, although he denies that he is bound by his predecessor's labor agreement, is an expression of his judgment that the operation has remained sufficiently similar to require the same employee skills, and confirms other objective evidence that there is "relevant similarity and continuity of operation." But his failure to retain those employees does not contradict such other evidence of continuity.

3. Despite the contrary holdings in *Wiley, Monroe Sander* and in this case below, the Company argues:

> "It has been consistently held, and reinforced in *Burns* that the *sine qua non* for successorship is continued employee majority status—i.e., whether a

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decision in *Burns*, not as Howard Johnson claims (Co. Br. p. 28), with respect to the test for successorship, but only with respect to the consequences of a finding of non-successorship. Thus the Company is simply incorrect when it argues that *Pride Papers* "recognized the indistinguishability" of the applicable successorship tests in § 301 cases and NLRB cases.

In *Boeing, supra*, the District Court did not state that *Wiley* by its own terms requires that a majority of the original employees be retained in order to establish successorship. Rather, the Court opined that "the *Burns* case has clarified the *Wiley* decision" (351 F. Supp. at 815), and that the retention of a majority of the predecessor's employees is the "standard of successorship" established by *Burns* (*id.* at 816). The question whether *Burns* "clarified" *Wiley* in the sense of declaring a new standard for successorship in § 301 cases lies at the heart of the present case and is discussed in the succeeding section of our brief.

> present majority of the new employer's labor force is composed of the prior owner's employees." (Co. Br. 8).

Since it cannot prevail if § 301 law is applied, Howard Johnson thereby places its reliance on the test for successorship established by the National Labor Relations Board in cases arising under § 8 of the Act. To justify that reliance Howard Johnson asserts that "the standards for determining successorship must be identical under § 158 [of 29 U.S.C.] and § 185 [of 29 U.S.C.]." (Co. Br. p. 24, initial caps omitted.) In this the Company errs. Because these different sections are designed to accomplish different purposes, wholesale adoption of the standards for determining who is a "successor" under one section into the other, is to repeat the error of legal analysis long ago identified by Walter Wheeler Cook:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." (Cook, *The Logical and Legal Bases of the Conflict of Laws*, p. 159, quoted with approval in *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 328.)

The authoritative statement of the Board law of successorship is part II of this Court's opinion in *Burns*, 406 U.S. at 277-282. That discussion can only be understood in light of the precise question which was there before the Court, and which Mr. Justice White identified in the first sentence of part II, the existence of "Burns' alleged duty to bargain with the union." (*Id.* at 277). Part II of *Burns* immediately addressed itself to the language of §§ 8(a)(5) and 9(a)

which declare the circumstances under which the duty to bargain attaches. On the basis of that language, the Court stated:

> "The Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, [so that] the initial issue before the Board was whether the charging union was such a bargaining representative." (*Id.* at 277).

The Court then approved the approach followed by the Board's Trial Examiner, and the Board itself, in addressing that issue:

> "The trial examiner first found that the unit designated by the regional director was an appropriate unit for bargaining.
>
> • • • •
>
> "The trial examiner then found, *inter alia*, that Burns 'had in its employ a majority of Wackenhut's former employees,' and that these employees had already expressed their choice of a bargaining representative in an election held a short time before. Burns was therefore held to have a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past." (*Id.* at 277-270.)[12]

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[12] The Board law is not clear as to whether a successor's bargaining obligation depends on the hiring of a "substantial number" or a "majority" of his predecessor's workforce. See *Burns*, 406 U.S. at 281, n. 6, quoting with apparent approval Board counsel's statement that a substantial number suffices. See also *IAM District Lodge 94* v. *NLRB*, 414 F.2d 1135, 1138 (C.A.D.C., Burger, J.), cert. denied, 396 U.S. 889. In *Burns* it was not necessary to confront that issue since the second employer had hired a majority. Nor is that issue relevant in this case since the Company's status as a successor does not turn on the composition of the workforce.

The basis of that approval was that:

> "In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification." (*Id.* at 278-279.)

In short, the standards which the Board had developed for successorship in cases like *Burns* were attuned to the precise issue before it —whether the employer is under a duty to bargain pursuant to § 8(a)(5) of the Act. And the requirement that the union be the representative of the successor's employees stems directly from § 9(a) of the Act, to which §8(a)(5) is subject. The determination that the union meets that requirement does not necessarily follow simply because there are some or even many indicia of continuity in the business. The Act itself does not impose on an employer who takes over a continuing business (however defined) a duty to hire or continue the employment of his predecessor's employees. Since the new employer's employees will not necessarily be the same, they will not necessarily choose to be represented by the same bargaining agent. Thus, absent some retention of the workforce, the representative status of the union must be independently determined in the manner in which questions of representation are normally settled (cf. *NLRB* v. *Gissel Mfg. Co.*, 395 U.S. 575), rather than on the basis of a conclusive presumption derived from "continuity • • • on the employer's side,"

(cf. *Burns* 406 U.S. at 305, Rehnquist, J. concurring and dissenting.)[13]

On the other hand, this Court has squarely held that the majority status standards of § 9(a) are not relevant in a suit to enforce a contract under § 301.

> "Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a). Compare § 8(a)(3), § 8(a)(5), § 8(b)(3), § 8(b)(4), § 8(d). Moreover, § 8(f), the 1959 amendment considered supra, 369 U.S., p. 27 contemplates contracting with unions that would not represent a majority. Lastly, if the federal courts' jurisdiction under § 301(a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased, • • • and litigation would be much hindered." (*Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 29.)

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[13] Our understanding that the *Burns* successorship test is an expression of the principles of §§ 8(a)(5) and 9(a), and not a standard of general application, is confirmed by this Court's recent observation in *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4044, n. 6:

> "A purchasing company cannot be obligated to carry out under § 10(c) every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see *NLRB* v. *Burns Int'l Security Services, Inc., supra*, 406 U.S., at 280 n. 5, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved. *Id.* at 280-281."

Notwithstanding *Lion Dry Goods,* which was followed on this point in *Wiley* (see p. 21, *supra,* quoting 376 U.S. 551-552, n. 5), Howard Johnson asserts repeatedly that the federal policy of employee free choice requires that the majority principle followed in *Burns* to determine a duty to bargain, must be applicable for a successorship determination under § 301 as well. It does so although the authority it cites correctly declares that the reason for the majority principle is that *"the making of agreements is impracticable in the absence of a majority rule."* (Co. Br. 9, n. 3, emphasis in original). On the other hand,

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." (H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20 (1935).)

It was to achieve a more perfect expression of this policy that Congress in 1947 added §§ 203(d) and 301 to the Act.

Once the agreement has been made, therefore, it no longer, contrary to Co. Br. 27, "draws its substance and validity from continuing union preference among the labor force." Were it otherwise, collective agreements could be abrogated by at any time since it is a commonplace that the identity of the workforce normally fluctuates during the life of an agreement. Indeed, *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 335, which defines the nature of the collective agreement, is dispositive:

> "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier,

> to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."
>
> * * * *
>
> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out."

There is no reason why employee turnover, which does not affect the parties' obligations under an agreement when the employer remains the same, should be destructive of all obligations thereunder, when "one owner replaces another but the business entity remains the same." (*Wiley*, 376 U.S. at 549.)

II. *WILEY* ESTABLISHES THAT AS GRISSOMS' SUCCESSOR, HOWARD JOHNSON IS UNDER AN OBLIGATION TO ARBITRATE PURSUANT TO GRISSOMS' CONTRACT WITH THE UNION.

We have shown thus far that Howard Johnson's primary argument (that *Burns'* holding as to the nature of the § 8(a)(5) law of successorship modified the § 301 law of successorship as stated in *Wiley*, Co. Br. 7-32) rests on a misreading of part II of the *Burns* opinion: we now show that Howard Johnson's secondary argument (that *Burns'* holding on the § 8 law regarding the successor employer's

obligation to assume his predecessor's collective agreement modified the § 301 law regarding a successor's obligation to arbitrate as stated in *Wiley*, Co. Br. 34-42) rests on a misreading of part III of the *Burns* opinion.

Howard Johnson's contention simply overlooks what was decided in part III of *Burns*. The Board had taken *Wiley* to mean both that the consequence of a successorship determination in a § 301 case is that the entire collective agreement binds the successor willy-nilly, and that the same consequence must follow such a finding in an unfair labor practice case under §§ 8(a)(5) and 8(d). On this basis the Board reasoned that it was required by *Wiley* to abandon its prior uniform holdings that §§ 8(a)(5) and 8(d) do *not* require a successor to assume his predecessor's contract. It was the soundness of these readings of *Wiley* that was at issue in part III of *Burns*. And this Court disagreed with the Board on both points:

> "We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 unit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized '[t]he preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of a national labor policy,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of extent to which, if any, the surviving company was bound by other provisions of the contract. *Id.* at 549 551
>
> "*Wiley's* limited accommodation between the legis-

lative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes does not warrant the Board's holding that the employer commits an unfair labor practice unless he honors the substantive terms of the pre-existing contract. The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate." (406 U.S. at 285-286.)

The Board derived the source of the asserted duty to honor a predecessor's agreement from the law regarding the successor's duty to bargain, as the latter was articulated and approved in part II of *Burns*. The opening sentences of part III state the thesis of the entire discussion that follows; *viz*, that the point of § 8(d) of the Act is that the statutory duty to bargain does not entail a duty to agree:

> "It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed. Section 8(d) of the Act expressly provides that the existence of such bargaining obligation 'does not compel either party to agree to a proposal or require the making of a concession.' Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." (406 U.S. at 281-282.)

But while the successor's duty to honor a predecessor's existing promise to arbitrate cannot be extrapolated from §§ 8(a)(5), 8(d) and 9(a), it does not follow that no such duty can be derived from a collective agreement enforceable

under § 301.[14] As the Court reiterated only the other day, "under the National Labor Relations Act, as amended, • • • disputed transactions may implicate both contractual and statutory rights." *Alexander* v. *Gardner-Denver*, —— U.S. ——, 42 U.S.L.Wk. 4214, 4218.[15] Indeed, the distinction between the making of agreements, which was to be left to the parties in the free play of economic force (see *Burns*, 406 U.S. at 287), and the enforcement, preferably by arbitration (see *Wiley*, 376 U.S. at 549), of agreements previously reached, in order to provide a period in which industrial strife was to be discouraged, is at the heart of the Act. The classic statement of this distinction is that of Senator Taft, quoted in *NLRB* v. *Erie Resistor*, 373 U.S. 221, 235, n. 13 cont.:

> "That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract.

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[14] It is well settled that different standards apply under §§ 301 and 8(d). The duty to bargain defined in § 8(d) extends only to "wages, hours and conditions of employment." "As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Labor Board* v. *Borg-Warner*, 356 U.S. 342, 349. When they do reach an agreement on a non-mandatory subject, such a "permissive term" may be enforced in a suit under § 301. *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 188. On the other hand, "just as § 8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement." (*Id.* at 185-186.)

[15] The Company objects that "the Sixth Circuit's dichotomy between Section 158 and 185 [of 29 U.S.C.] cases for purposes of determining successorship is wholly unworkable, for it occasions

> We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. * * * 93 Cong. Rec. 3835 (1947)."

Burns dealt with the first side of that distinction. The entire discussion revolves about the portions of the 1935 legislative history, the early Wagner Act precedents, the evolution of the "express statutory mandate" of § 8(d), and this Court's decision in *Porter Co.* v. *NLRB*, 397 U.S. 99, in which "this history was reviewed in detail and given controlling effect," all of which were addressed to situations in which there is no *relevant* agreement whatsoever. (406 U.S. at 282-284, 287-288.) At three separate places in the course of that discussion the Court emphasized that its rejection of the Board's rationale stemmed from the absence in *Burns*, of a nexus, like that in *Wiley*, between a collective agreement freely entered into and the obligations sought to be imposed on the successor employer.

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difference in result merely because of the forum chosen." (Co. Br. 29.) But it is inherent in the Congressional scheme of "concurrent overlapping remedies neither preempting the other," (*NLRB* v. *Strong*, 393 U.S. 357, 360), that a party may assert claims under either or both statute and contract. See, *e.g.*, *Smith* v. *Evening News*, 371 U.S. 195; *NLRB* v. *Huttig Sash & Door*, 377 F.2d 964, 969-970 (C.A.8, Blackmun, J.). Since the Board was denied plenary jurisdiction to enforce contracts, see p. 36 *infra*, there will necessarily be situations in which the courts have the power to grant relief under § 301 where none would be available before the Board under § 8. See e.g., *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. at 186-187. When *Lincoln Mills* pointed out that the Act itself furnishes "some substantive law" (353 U.S. at 457, Co. Br. 35), it did not hold that the only rights enforceable by contract are those which have an independent basis in the unfair labor practice provisions of the Act.

"Here there was no merger, sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8(a)(5) and § 9(a). But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract."

• • • •

"The source of [Burns] duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract.

• • • •

"[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Cf. *Oilfield Maintenance Co., Inc.*, 142 N. L. R. B. 1384 (1963). Such a duty does not, however, ensue as a matter of law from the mere fact than an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case." (406 U.S. at 286, 287, 291.)

Thus, *Burns* does not hold that a successor may in no case be bound by operation of law over his objection to observe

his predecessor's agreement, but rather that § 8(a)(5) is not the source of that obligation so that the NLRB is not the proper enforcing tribunal.

Wiley dealt with situations on the other side of the distinction between the making of agreements and the enforcement of agreements already made. For, the source of the duty to honor the arbitration provision of the agreement which the Court declared in *Wiley* was not the statute but "a contract, [to which] Interscience, Wiley's predecessor, was party." (376 U.S. at 550.) And the limitation of § 8(d) relied on in *Burns*, is not addressed to the enforcement of agreements already made. On the contrary, while the 1947 Congress was critical of the Board for making agreements for the parties (see *Burns*, 406 U.S. at 283), another of its major concerns was that valid agreements were too frequently dishonored.

Accordingly, by § 301, Congress provided that contracts between unions and employers shall be binding and enforceable. That provision commits the responsibility for "the enforcement [of such contracts] to the usual processes of the law and not to the National Labor Relations Board." (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42. See *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 508-513; *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. at, 186-187.) And the "process by which agreements, though not formalized in writing, may be 'implied' " by the courts, is familiar to the law of contracts. (See *Perry* v. *Sindermann*, 408 U.S. 593, 601-602; *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 111 N.E. 214 (Cardozo, J.).) It is by that process that this Court determined "that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an

implied obligation not to strike over such disputes," (*Gateway Coal Co.* v. *United Mine Workers*, —— U.S. ——, 42 U.S.L.Wk. 4095, 4099, describing *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95 and *Boys Markets* v. *Retail Clerks*, 398 U.S. 235.) And it is that process which has been utilized in deriving from § 203(d) of the Act "the now well-known presumption of arbitrability for labor disputes." (*Gateway Coal*, 42 U.S.L.Wk. at 4098, referring to the *Steelworkers* trilogy, *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 and companion cases.)

That presumption governed the decision in *Wiley* (376 U.S. at 550; emphasis in original):

> "[A]lthough the duty to arbitrate, • • • must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[4] This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience. Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of national labor policy."
>
> "[4] Compare the principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that an interpretation that covers the asserted dispute, [*Steelworkers* v.] *Warrior & Gulf*, [363 U.S.] pp. 582-583, be favored."

The limited office of the presumption of arbitrability is to establish that where the parties have provided for

arbitration at all, any given dispute will be subject thereto unless the parties have consciously determined to exclude it. Just as the parties can expressly exclude specific issues from arbitration, so they can specifically provide that an arbitration provision will not survive some or all changes in the enterprise, such as, for example, a merger. The presumption operates in the same manner as the *Lucas Flour* rule whereunder a no-strike obligation is implied from mandatory grievance arbitration, unless it is expressly negated:

> "Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in Boys Markets. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." (*Gateway Coal*, 42 U.S.L.Wk. at 4100.)

Thus, *Wiley* is at a yet further remove from *Burns*. The former does not require survival even of the arbitration provision for it announces only a presumption of arbitrability. The Board's ill-fated *Burns* decision had announced a rule of public law overriding any contrary intent of the parties that the entire contract is binding on the successor.

The limited scope of the *Wiley* rule has profound practi-

cal significance: the "flexible procedures of arbitration" assure the successor that the extent of his obligations will be determined within the confines of the agreement and on the basis of the realities and equities in each particular case.[16] As the Third Circuit stated in *United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F.2d 891 (C.A.3):

> "Although the preexisting labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract." (*Id.* at 295).

The court below well understood that in this respect also the *Wiley* rule stands in sharp contrast to the Board law disapproved in *Burns*. After quoting the foregoing passage from *Reliance Universal* (Pet. App. 10a) that Court continued:

> "The NLRB in its *Burns* decision had adopted an all-or-nothing approach. If the employer was a successor

---

[16] See *Wiley*, 376 U.S. at 546-547, quoting *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241, and also citing *Warrior & Gulf*, *supra*, 363 U.S. at 582.

> then it was required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). • • • As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. • • • In arbitration proceedings as ordered below such rigidity is not present." (Pet. App. 10a-11a.)

We have thus seen that part III of the *Burns* opinion, by distinguishing *Wiley*, established that the consequence of a successorship finding (like the identification of the successor, which is the first step in the analysis, see pp. 18-29, *supra*), depends on the context in which the issue arises. And that analysis is further confirmed by the Court's most recent confrontation with successorship in *Golden State Bottling Co., supra*. There the ultimate issue was:

> "[W]hether the bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with back pay." (42 U.S.L.Wk. at 4040).

That question was answered in the affirmative. All American, which purchased the assets of Golden State, did not deny that it was Golden State's successor, so that it was unnecessary for the Court to formulate standards for determining successorship in cases that turn on the reach of a remedial order. But All American did contest its duty to remedy Golden State's unfair labor practices, including the Board order that it reinstate an employee who had been illegally discharged by Golden State. In discussing that

problem, the Court after reaffirming both *Wiley* and *Burns* (*id.* at 4042-4044), addressed itself to the particular policies of the Act which were implicated by the Board's effort to require the successor to remedy his predecessor's unfair labor practice and differentiated those from those which were involved in *Burns*. (*Id.* at 4044, and particularly n. 6, quoted at p. 28, n. 13, *supra.*) If *Burns* had established a universal rule to govern all successorship cases, it would have not only been pointless, it would have been impossible for this Court in *Golden State* to first differentiate *Wiley* and *Burns*, and then to differentiate *Golden State* from both.

In sum, Petitioner's thesis is that the present § 301 suit for an order to arbitrate is governed not by *Wiley*, which also was a § 301 suit for such an order, but by *Burns*, which decided that a successor who has a § 8(a)(5) duty to bargain, nevertheless does not have a duty derived from that statutory provision to assume his predecessor's contract. The Company's argument is the converse of the one which was made and rejected in *Burns*, *viz.*, that a successor under Board law has a § 8(a)(5) duty to assume the whole contract because *Wiley* had held that an employer who becomes a successor under the different § 301 standard has a contractual duty to arbitrate. This supposed equation is no more valid now when it is asserted by an employer than it was in *Burns* where it was asserted by the other side. Even as *Wiley* did not control *Burns*, *Burns* does not govern this case. For this case differs from *Burns*, even as it is identical to *Wiley*.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

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No. 73-631

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October Term, 1973

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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S. Rep. No. 92-1131, 92nd Cong., 2nd Sess., p. 1 (1972) 23

Federal Trade Commission—*Current Trends in Merger Activity* (Statistical Report No. 10) 20

Supreme Court of the United States

October Term, 1973

No. 73-631

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae,* in support of the position of the respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

John Wiley & Sons v. *Livingston*, 376 U.S. 543 (1964), a unanimous opinion by Mr. Justice Harlan, stated the basic principles of the § 301 federal law of labor agreements with regard to the survival of the obligation to arbitrate across a change in ownership. Then, two years ago, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, delineated the § 8(a)(5) law regarding the survival of the statutory obligation to bargain across such a change, and in so doing distinguished between the contractual obligations enforceable in the courts as declared in *Wiley* and the statutory bargaining obligations enforceable before the Board. Finally, just two months ago, *Golden State Bottling Co.* v. *NLRB*, ... U.S. ....., 42, U.S.L.Wk. 4039, 4043, a unanimous opinion by Mr. Justice Brennan approving the Board law regarding a purchaser's duty to remedy a § 8(a)(3) violation committed prior to a *bona fide* sale, affirmed *Wiley's* continuing vitality.

Nevertheless, the Chamber of Commerce, nothing loath, argues that the unanimous holding of this Court in *Wiley*, the essential premise of which has so recently been unanimously reaffirmed, is no longer good law: "*Wiley* and *Burns* * * * are logically irreconcilable * * *. In essence, *Wiley* creates a fiction of 'survival'. In *Burns*, this Court rejected the fiction." C. of C. Br. 4, 7.

We begin with a demonstration of the insubstantiality of the premise for this attack upon *Wiley*—that its reasoning and result cannot be reconciled with that of *Burns*. Then, in what is perhaps an excess of caution, we show that the development of the law since *Wiley* does not disturb, and in major particulars reinforces the validity of *Wiley's*

rationale.

1. *Wiley* was a § 301 case brought by a union to compel the surviving corporation (Wiley) in a merger to honor the arbitration obligation imposed in the collective agreement between the union and Interscience, the merger partner that did not survive. This Court concluded that there was "relevant similarity and continuity of operation across the change in ownership," and, that being so, said: "We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." 376 U.S. at 550, 551.

Subsequently, in *Burns*, which arose not under § 301 but under § 8(a)(5), the provision setting out the duty to bargain, this Court while concluding that:

> "Where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union;" (406 U.S. at 281)

also ruled that:

> "It does not follow, however, from [this] duty to bargain that [the new employer] was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the previous employer] and to which [the new employer] had in no way agreed. Section 8(d) of the Act expressly provides that the existence of such bargaining obligation 'does not compel either party to agree to a proposal or require the making of a concession.'" (*Id.* at 281-282.)

In other words, *Wiley* implied, from the collective agreement in force at the time of a change in ownership, "construed in the context of a national labor policy," a *contractual* obligation to arbitrate which is binding on a "successor" that runs with a continuing industrial community; on the other hand, *Burns* holds that the statute does not impose on a successor an analogous statutory obligation to honor the entire predecessor—union contract.[1]

The Chamber argues that *Wiley's* and *Burns'* "continued co-existence permits a dichotomy that threatens to unravel the fabric of uniformity that Congress has sought and that this Court has directed in the establishment and enforcement of a national labor policy." C. of C. Br. 4-5. The short but complete answer to this is that *Burns* does not state new law; it reestablishes a limitation on the Board's authority understood at the time *Wiley* was decided.

In *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395 (1952), the Court construed the duty to bargain under §§ 8(a)(5) and 8(d) of the Act and held that it is

> "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (*Id.* at 404.)

That conclusion was based on the history of the Wagner Act, this Court's decision under the analogous Railway Labor Act in *Terminal Railroad Ass'n.* v. *Trainmen*, 318 U.S. 1, the legislative history of the 1947 amendments, and

[1] The Respondent's brief (at pp. 18-30) demonstrates that the term "successor" has a different import in the § 301 and § 8(a)(5) contexts. We therefore do not develop that point here.

particularly the express language of § 8(d). 343 U.S. at 401-404.

It was this understanding of the statutory duty to bargain which prevailed when *Wiley* was decided; and it was this view which underlay the Board decisions prior to *Wiley*, holding that a successor employer does not have a statutory duty to adopt his predecessor's contract.[2] The same statutory materials both governed the result in the post-*Wiley* decision in *Porter Co.* v. *Labor Board*, 397 U.S. 99, and provided the framework for the conclusion stated in part III of the *Burns* opinion that the earlier Board successorship rulings were correct, and that the Board erred when it read *Wiley* as requiring their overruling. See 406 U.S. at 281-291.

The argument which runs through the Chamber's brief that "*Wiley* permits indirectly what *Burns* prohibits directly" (C. of C. Br. 10), is based on a misreading of *Burns*, and necessarily also of § 8(d), for these speak only of limitations on the *Board's* power. The distinction Congress drew between "official compulsion" (C. of C. Br. 10)

[2] This Court's consciousness of that line of Board authority when it decided *Wiley* is evidenced by the distinction it drew between the question before it and that treated by the Board, supported by citation to relevant Board cases:

> "In addition, we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership. See, e. g., *National Labor Relations Board* v. *Aluminum Tubular Corp.*, 2 Cir., 299 F.2d 595, 598–600; *National Labor Relations Board* v. *McFarland*, 10 Cir., 306 F.2d 219; *Cruse Motors, Inc.*, 105 N.L.R.B. 242, 247. This Union does not assert that it has any bargaining rights independent of the Interscience agreement; it seeks to arbitrate claims based on that agreement, now expired, not to negotiate a new agreement." (376 U.S. at 551.)

imposed by the Board and that imposed by a court was explained by Mr. Justice Stewart for a unanimous Court in *NLRB* v. *C & C Plywood*, 385 U.S. 421, 427-428:

> "When Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts, it was acting upon a principle which this Court had already recognized:
>
> > 'The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them.'
>
> "*Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 US 1, 6. To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step." (Footnotes omitted.)

The Court then went on to establish that the denial to the Board of plenary jurisdiction over contractual questions does not mean that the agency has "no jurisdiction to consider a collective agreement prior to an authoritative construction by the courts," where that is necessary "to deal with the unfair labor practice charge" before it. *Id.* at 428-430. Thus, Congress' allocation of responsibility was based not on the view that the Board is institutionally incapable of construing agreements, but entirely on the

"principle" articulated in *Terminal Railroad Ass'n. supra,* and embodied in § 8(d).

The Chamber invokes "this Court's decisions which have stressed the necessity for decisional uniformity in the area of labor relations." C. of C. Br. 9, & n. 16, citing *inter alia, Teamsters Union* v. *Lucas Flour Co.,* 369 U.S. 95. But that case, and the others cited *id.,* deal with uniformity between federal and state law; Congress, of course, has power to establish a national labor policy which is not monolithic, but rather achieves simultaneously a variety of objectives even if these appear to some to contain "inherent inconsistencies," (C. of C. Br. 4), or to be "logically irreconcilable," (*id.* at 5). The *Lucas Flour* case itself demonstrates the power of the courts under § 301 to deprive a party of its economic weapons, despite the absence of an express contractual commitment renouncing these. That the Chamber would be among the last to disapprove the *Lucas Flour* result is apparent from its endorsement of that decision in its brief as *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers* (No. 72-782, this Term) at pp. 6. Yet if, as the Chamber argues, "*Burns* condemns all official compulsion—whatever the source," (C. of C. Br. 10, footnote omitted), this Court must overrule not only *Wiley* but *Lucas Flour.* For, in both cases it was determined, in accordance with familiar judicial procedures, that an agreement which contained a broad arbitration clause was " 'instinct with an [additional] obligation,' imperfectly expressed." *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214, 215.

Indeed, the opinion in *Gateway Coal Co.* v. *United Mine Workers,* ..... U.S. ....., 42 U.S.L.Wk. 4039, demonstrates

that the courts as a matter of judicial interpretation can impose the very duty to arbitrate which *American National Insurance, supra,* held may not be imposed by the Board. In *Gateway* the Court reaffirmed the presumption of arbitrability announced in the *Steelworkers* trilogy, and followed in *Wiley,* which directs arbitration of all grievances under an arbitration clause unless there is an express prohibition of arbitration, 42 U.S.L.Wk. at 4098-4099. But in *American National Insurance* the Court squarely held that it would contravene § 8(d) for the Board to prohibit bargaining for a broad management functions clause designed to avoid arbitration of all the subjects covered in that clause, (343 U.S. at 404-409). Thus, *American National Insurance* holds that the Board may not determine the scope of the duty to arbitrate. The Courts however, may and frequently do exercise such authority. It is this power to imply a promise to arbitrate which the Chamber, in attempting to overturn *Wiley,* disparages as "sanction[ing] the *compulsion* of collective bargaining terms," (C. of C. Br. 8, emphasis in original). But compare the brief of the Chamber of Commerce as *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers* (No. 72-782, this Term) at pp. 6-10.

Additionally, the Chamber objects that the co-existence of *Wiley* and *Burns* would lead to "forum shopping" by unions. C. of C. Br. 9. While the point is not carefully articulated, the inconsistency asserted here is not between *Wiley* and part III of *Burns* (which disapproved the Board ruling that there is a § 8(a)(5) duty to honor a predecessor's contract), but between *Wiley* and part II of *Burns* (which approved the Board law that a successor does have a § 8(a)(5) duty to recognize the incumbent union). The thrust of the argument is that the successor's duty to arbi-

trate stated in *Wiley* is inconsistent with his duty stated in part II of *Burns* to bargain with the union over the terms of a new agreement.[3] The Chamber contends that the union would be given the opportunity to bargain if that suited its purpose and to impose the old contract by the § 301-arbitration route if that suited its purpose. To this there are two conclusive answers, one of principle and one of practicality.

The argument of principle is that there is no valid objection of policy to allowing a union or an employer which has both contractual and statutory claims to invoke either or both. These are "concurrent overlapping regimes neither preempting the other," (*NLRB* v. *Strong*, 393 U.S. 357, 360), and it is not forum shopping for a party to assert a right which Congress gave in the forum which Congress provided. See also *Steelworkers* v. *American International Aluminum Corp.*, 343 F.2d 147 (C.A.5); *NLRB* v. *Huttig Sash & Door*, 377 F.2d 964 (C.A.8).

Moreover, in the precise circumstances of successorship the Chamber's objection of onesidedness is totally misconceived.[4] For, if, under § 301 law as stated in *Wiley*, the new

[3] While the standards for successorship under § 301 differ from those under § 8(a)(5), see p. 4, n. 1, *supra*, there will be cases where an employer is a successor for both purposes, and the same union is the representative before and after the successor's takeover. It is in those situations that the problem hypothesized by the Chamber would arise.

[4] The only possibility of onesidedness in the present context is under a rule which would allow an employer who is taking over a business enterprise to determine whether he will or will not be a successor by establishing as the *sine qua non* of successorship that he hire a substantial number or a majority of the original workforce. See Pet. App. 7a.

employer is a "successor," that status does not depend upon the union's assertion of a claim of successorship. Rather, the employer can claim that he is a successor and invoke the arbitration clause, demanding arbitration over the scope of his contractual obligations. He, too, can insist that "industrial strife [be] avoided [and that the respective rights of the parties] be resolved by arbitration rather than by 'the relative strength * * * of the contending forces,' *Warrior & Gulf, supra,* 363 U.S. at 580." *Wiley,* 376 U.S. at 549.

2. We have seen thus far that the Chamber's principal argument—that *Burns* is inconsistent with *Wiley*—fails. In the course of developing that argument, however, the Chamber also attacks *Wiley* directly. We therefore show that *Wiley's* holding is sound today just as it was in 1964. This can best be done by recalling each of the premises upon which it rests and demonstrating their present validity.

(a) The § 301 law of successorship which *Wiley* "fashioned 'from the policy of our national labor laws,'" (376 U.S. at 548), is a considered rejection of "the principles of law governing ordinary contracts [that do] not bind to a contract an unconsenting successor to a contracting party," (*id.* at 550).

As Mr. Justice Harlan appreciated, the very reason for a federal law of labor agreements is that "a collective bargaining agreement is not an ordinary contract." *Id.* And "[c]entral to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance, see [*Steelworkers* v. *Warrior & Gulf,* 363 U.S.] at 580, and by the requirements of the National Labor

Relations Act, that it is not in any real sense the simple product of a consensual relationship." 376 U.S. at 550. The passage from *Warrior & Gulf* referred to in *Wiley*, stated:

> "When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations."

Just as the presuppositions of the "law governing ordinary contracts" do not control the law governing the making of collective agreements, they do not control the law governing the effect of collective agreements already made. Change is a fact of life no less certain than death and taxes, and prior to *Wiley* the law as to the impact of changes on the employee side was already well settled, and that law was not the "law governing ordinary contracts." Once a collective agreement is reached, it binds all employees, including those who do not wish to be represented in the establishment of the rules. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer, and any such agreement is void. *J. I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Finally, the federal law goes so far as to prohibit the employees from selecting a new bargaining representative during the term of an agreement (so long as it does not exceed three years). *General Cable Corp.*, 139 NLRB 1123.

In short, the federal law prior to *Wiley* (and all of the foregoing proportions remain good law today) was that an agreement is not a simple contract, binding only upon those who can be said to be parties to it in the conventional, common law sense. It is, rather, a privately created code, established by negotiation between union and management, regulating the industrial community during its term:

> "Without pushing the analogy too far, the agreement may be linked to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established." (*J. I. Case*, 321 U.S. at 335.)

Indeed, prior to *Wiley* the Court had not only differentiated labor agreements as such from ordinary contracts, it had distinguished between the enforceability, in these two contexts, of promises to arbitrate. (It is, of course, the binding effect of a promise to arbitrate that was at issue in *Wiley*.) In *Warrior & Gulf*, 363 U.S. at 578, it was explained that:

> "The run of arbitration cases, illustrated by *Wilko* v. *Swan*, 346 U.S. 427, becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial

> agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."

Certainly then, it would have been a sharp break to repair to the common law in determining the effect of a change in ownership on the continuing force of an arbitration clause of a collective agreement. Against the background just sketched, adoption of a rule that "a change in the corporate structure and ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established," (*Wiley*, 376 U.S. at 549), unless the new owner willed otherwise, would have created a disequilibrium in the federal law. On that view, while the duty to arbitrate is never affected by employee turnover, the successor employer would be free to insist upon or repudiate the arbitration agreement on the basis of his own self-interest rather than on the basis of neutral principles attuned to the national labor policy. Thus, unlike the rule adopted in *Wiley*, the successorship rule of ordinary contracts, which the Chamber prefers, would create an adventitious situation in which one party, but not the other, is bound by the agreement. Section 301 was enacted precisely because Congress believed that unions had been the beneficiary of a converse advantage since they were generally not subject to suit. And in *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, this Court perceived a similar imbalance carrying "devastating implications for the enforceability of arbitration agreements," (*id.* at 247), (in that instance, favoring unions), under the aegis of *Sinclair Rfg.*

Co. v. *Atkinson*, 370 U.S. 195, and therefore overruled *Sinclair*.

(b) The "strong federal policy favoring arbitration of labor disputes was the lynchpin of this Court's reasoning in *Boys Market*." *Gateway Coal*, 42 U.S.L.Wk. at 4099. This accurately describes the reasoning of *Wiley* as well. For, Mr. Justice Harlan "recognized the central role of arbitration in effectuating national labor policy," (376 U.S. at 549), and rejected the common law successorship rule on the ground that "[i]t would derogate from 'the federal policy of settling labor disputes by arbitration," (*id.*). And *Gateway's* holding—"that the 'presumption of arbitrability' announced in the *Steelworkers Trilogy* applies to safety disputes" (42 U.S.L.Wk. at 4099)—parallels *Wiley's* reliance on this aspect of the national labor policy. Only the most callous disregard for the value of human life could justify the assertion that the arguments against arbitration in a successorship situation are more weighty than those advanced by the majority in the Third Circuit in *Gateway*.

The reasoning as well as the holding of *Gateway* is instructive here. Mr. Justice Powell first stated that "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command," (§ 203(d)), and endorsed the reading of that command in the *Steelworkers* trilogy. *Id.* at 4098-4099. Thus, both the statutory and decisional authority relied upon in *Wiley* were reaffirmed. Justice Powell then went on to apply the general principles stated in the *Trilogy* to the problem there at hand since they "are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement," (*id.* at 4099). The lessons drawn from national labor policy for

safety cases are equally pertinent in successorship cases.

First, in each, "industrial strife may as easily result from [the] unresolved controvers[y] * * * as from those on other subjects" which may arise during the term of an agreement. *Id.*

Second, "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to [*Wiley*] case[s] as to others." *Id.* A new owner may make extensive entrepreneurial changes and do so consistently with a broad management functions clause, (cf., *American National Insurance*, 343 U.S. at 404-409), and he may perceive problems and possibilities inherent in the situation facing the company that were unforeseen, and perhaps unforeseeable, from the vantage point of those who negotiated the contract. *Wiley* specifically directed that questions concerning the successor's obligations which thereupon arise are to be referred to the arbitrator to determine "the effect of the merger on the rights of the covered employees," (376 U.S. at 554-555).

Recognizing the fact that changed conditions may be taken into account in interpreting an agreement under *Wiley* is, of course, not to make new law, nor to allow the interpreter the power to pick and choose the contract terms he will enforce.[5] Even when there is only one employer it is by no means unusual for the contract to allow him to carry out entrepreneurial decisions designed to meet changed circumstances which result in extensive changes in the working environment of the plant. Moreover, be-

[5] Contrast *Alexander* v. *Graham-Denver Co.*, —— U.S. ——, 42 U.S. L.Wk. 4214, 4219 holding that the arbitrator's special competence does not extend to the interpretation of public law.

cause of the breadth of regulation undertaken in a collective agreement and the difficulties inherent in the attempt to set up a system of industrial self-government, unforeseeable contingencies will, of course, arise. As this Court has recognized, the foregoing does not mean that the resulting problems are deemed to be unregulated and that the agreement is no longer binding; their resolution, within the confines of the contract, are grist for the arbitrator's mill:

> "Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." (*Warrior & Gulf*, 363 U.S. at 581-58.)

Where a successor is involved, it is reasonable to suppose that there will be no shortage of these difficult questions of interpretation. But these questions will not be different in kind from those that arise in the one-employer situation. *Wiley* itself amply illustrates this point The most difficult problems in that case stemmed from Wiley's decision to consolidate two previously separate operations in one plant. And the complex task of working out those problems would have been similar if there had been no merger and if Wiley had been a two-plant company which decided to merge its two previously separate operations. See *Interscience Encyclopedia*, 55 LA 210, the arbitration which *Wiley* directed. The process of contract interpretation and administration mandated by §§ 203(d) and 301 insures

sufficient flexibility in cases involving one employer, and the underlying postulate of *Wiley* was that this process is sufficiently adaptable to serve the same salutary function where there is a successor. The event confirmed this Court's confidence.

In the *Interscience* arbitration the arbitrator concluded:

> "I. The five (5) issues submitted for determination pursuant to the terms of the collective bargaining agreement effective February 1, 1960, are arbitrable.
>
> "II. (a) The seniority rights built up by the Interscience employees shall be accorded to said employees up to January 12, 1962, the date the Interscience employees were moved to the Wiley headquarters and when the continuity of their identity separate from the Wiley employees ceased.
>
> "(b) In the circumstances of this case, the Company was not under any obligation to continue to make contributions to the District 65 Security Plan and District 65 Security Plan Pension Fund after September 30, 1961.
>
> "(c) The job security and grievance provisions of the Interscience Agreement continued in full force and effect up to January 12, 1962, but not thereafter.
>
> "(d) The Company did not have any continued liability for severance pay under the Interscience Agreement.
>
> "(e) The Company was not obligated to make the vacation payments under the Interscience Agreement after January 12, 1962. In accordance with this finding, the following employees shall be compensated in the stated amounts for accrued vacation based upon the

continuance of the Agreement until January 12, 1962, rather than October 2, 1961, the date of the merger:

Sophie Drucker	$50.72
Esther Gilbert	57.72
Janet Murray	71.14
Hoyt Peters	53.04
Esther Weinstein	54.08
Hazel Sinclair	51.30."

(55LA at 225-226.)

The ultimate result of the *Wiley* litigation was, therefore, sensitive to the successor's legitimate interests. And, viewed from the standpoint of the national labor policy, it is enlightening that the dispute was settled through an arbitration award accepted by all of the parties. None of the scattering of arbitrations since *Interscience,* so far as we are aware, have presented as complex a factual situation. And none are mentioned, much less subjected to reasoned criticism, by the Chamber which contents itself with the *ipse dixit* that *Wiley* is unworkable since it authorizes the arbitrator "contrary to his legitimate role, [to] 'dispense his own brand of industrial justice,' " (C. of C. Br. 10-11). We have already shown that this characterization is incorrect. Thus, these dire forebodings are best answered by this Court's reaction to the fears expressed by the Third Circuit in *Gateway:* "We see little justification for [such an] * * * assumption, especially since the parties are always free to choose an arbitrator whose knowledge and judgment they trust," (42 U.S.L.Wk. at 4099).

The *Gateway* decision also serves to underline another major aspect of the *Wiley* rule. For, Mr. Justice Powell tied the bond between the "implied obligation not to strike," stated in *Lucas Flour, supra,* 369 U.S. 95, and the

"'presumption of arbitrability' announced in the *Steelworkers Trilogy*," (42 U.S.L.Wk. at 4099). Both are contractual obligations implied in law and both may be negated only by "an explicit expression of such an intention," (*id.* at 4100). Because the law disfavors strikes over arbitrable disputes, the *Lucas Flour* presumption places a burden on unions that wish to retain that right. In contrast, the law favors the arbitration of disputes that arise during the term of an agreement and the burden imposed by the *Steelworkers* trilogy presumption (applied in *Wiley*) is therefore upon the party that desires to restrict the scope of the promise to arbitrate.

In the successorship context the allocation of this burden is entirely fitting, and not only because it serves the overall purposes of the national labor policy. The employer is the party in whose interest it is to maximize the alienability of the business and who controls the timing of a possible sale or merger. It avoids disrupting the bargaining process over a hypothetical problem to require him to wield the laboring oar. Moreover, a collective agreement does not define a series of rules whose breach can normally be recompensed in damages; "the mature labor agreement may attempt to regulate all aspects of the complicated relationship, [between the employer and employees and between the employees themselves] from the most crucial to the most minute over an extended period of time," (*Warrior & Gulf*, 363 U.S. at 580). For both parties the value of a major portion of the bargain rests on the availability of specific performance. Thus, the result reached in *Wiley* is buttressed by the reasoning in *Boys Markets* where the Court said:

> "Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld." (398 U.S. at 248.)

By the same token, where the continuity of the employing entity is retained over a change in ownership "the effectiveness of [arbitration] agreements would be greatly reduced if [specific performance against the successor] were withheld."

Again (see p. 19, *supra*), the Chamber contents itself with a rhetorical flourish, arguing that *Wiley* places "shackles" on employers that "discourage" transfers. C. of C. Br. 13-14. But *Wiley* no more shackles employers than *Lucas Flour* shackles unions. And, it is pertinent that the Federal Trade Commission's latest annual survey of *Current Trends in Merger Activity* (Statistical Report No. 10, Table 1), shows that in 1971 (the last year surveyed) there were 2,633 mergers and acquisitions, while in 1963, the year before *Wiley*, there had been 1,479.

(c) The third of the insights that informed the holding in *Wiley* is stated in the passage in that opinion quoted and followed in *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4043:

> "The Board's *Perma Vinyl* principles introduced into the balancing process [used in determining a purchaser's obligation to remedy a § 8(a)(3) violation committed before a sale] an emphasis upon protection for the victimized employee.
>
> • • • •
>
> "The Board found support for this policy, and we

think properly, in the Court's observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 549 (1964):

> 'Employees . . . ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.''

And just as *Golden State* reaffirms the national labor policy of according employees "some protection * * * from a sudden change in the employment relationship," the decision in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965) provided a forceful expression of the "prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers."

The Chamber is not content to preserve this employer prerogative and to deprive employees of the protection stated in *Wiley;* it seeks to deliver his employees into a successor's hands stripped of all the Act's protections:

> "To unduly restrict an employer's ability to make initial adjustments necessary to convert a marginal business to a profitable one will discourage the purchase not only to the disadvantage of the predecessor but also to his employees. Extended negotiations, perhaps leading to impasse, would certainly hinder putting the business in good order and would not likely result in

> any benefit to the employees. * * * If the successor must bargain with the union over changing these pre-existing conditions, he is handicapped in turning the business around and making it viable." (C. of C. Br. 21.)

This is to retain so much of *Wiley* as insures employers transitions without industrial strife, while relieving employers of the concommitent obligations imposed by *Wiley* on the basis of § 301. It is just such one-sidedness with respect to contractual obligations that Congress and this Court have disapproved. See pp. 13-14 *supra*.

3. The principles stated in *Wiley* have not only continued to enjoy judicial acceptance, they have been granted implicit legislative approval.

On October 9, 1972, the Service Contract Act (41 U.S.C. § 351 *et seq.*), was amended by the addition *inter alia* of a new section 4(c) (set out as an Appendix at p. 25 *infra*) providing that a succeeding contractor shall pay its service employees no less than the wages and fringe benefits provided for in the collective bargaining agreement with the predecessor employer. Accordingly, so long as the incoming employer performs under a succeeding contract "under which substantially the same services are furnished" as were provided by the outgoing employer, the existing collective bargaining agreement with the predecessor employer establishes the norm for the compensation of the employees. The congressional purpose is to provide "assurance that employees working for service contractors under a collective bargaining agreement will have wages and fringe benefits under a new service contract no lower than those under current agreement." S. Rep. No. 92-1131, 92d Cong., 2d Sess., p. 1.

> "Ordinarily, where service employees are covered by a collective bargaining agreement, a successor contractor furnishing substantially the same services at the same location will be obligated to pay such service employees no less than wages and fringe benefits required by such agreement. This requirement would likewise apply to prospective wages and fringe benefits." *Id.*, at p. 4.

The national labor policy which Congress has thus expressed is that a change in the identity of the employers should not operate to divest the employees of the benefits of an existing collective bargaining agreement which had established the labor standards for performance of the work. That confirms the philosophy that informed the decision in *Wiley*.[8]

CONCLUSION

For the above stated reasons as well as those set out in

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[8] Both the Chamber (C. of C. Br. 20-21) and the Company (Co. Br. 37-41) address themselves to the question of the time at which the new employer's successorship status is to be determined. While it is not necessary for purposes of this case, since all the factors that either party deem relevant to the successorship determination remained constant throughout, we conclude with a brief response.

In *Burns*, successorship status was determined as of the time the new employer had selected its workforce, since the duty to bargain was derived from the fact that these were the employees of the previous employer. See 406 U.S. at 279 and 295. On the other hand, in *Golden State* the company's obligation to reinstate its predecessor's employees did not attach until it actually took over operations, and was thereby able to provide employment; necessarily, its backpay obligation did not begin to run until that time either. See 42 U.S.L.Wk. at 4040, 4045. The *Wiley* opinion did not focus on this question and determined successorship on the basis of what

the respondent's brief, the decision below should be affirmed.

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March 1974

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actually happened after Wiley took over. However, the correct solution in principle, we submit, is that successorship should be determined for § 301 purposes as of the time that the merger, sale, or other event transpires which determines that there will be a change in the employer's identity. For, both the protection of the employees and the preservation of industrial peace require that the parties know at that time whether there is an obligation to arbitrate, or contrariwise a right of the union to strike and the new employer to attempt to establish his own terms without regard to the rights of the employees under the prior agreement. This solution creates no difficulty, because in almost every instance the new owner will know the purpose for which he has acquired the business. When the union is informed that a change will take place, and demands arbitration the employer who has this information in his exclusive possession can, if he denies that he is successor explain why, in light of his plans, "any substantial continuity of identity in the business enterprise before and after [the] change" (376 U.S. at 551), will be absent.

APPENDIX

Section 4(c) of the Service Contract Act, as amended, 42 U.S.C. § 351 *et seq:*

> "No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality."

MAR 14
MICHAEL RODAK, J

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.
Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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Respondent,

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF OF PETITIONER

In its Petition for Certiorari and in its Brief to this Court, Petitioner discussed two questions: whether Petitioner is a "successor employer" when it has selected a work force which does not contain a majority of employees who were employed by a prior employer; and whether Petitioner is required to arbitrate pursuant to the arbitration provisions of a collective bargaining contract between a prior employer and a union. Respondent's Brief, in discussing these questions, has placed almost sole reliance on the decision of this Court in *John Wiley & Sons* v *Livingston*. Petitioner submits that *Wiley* is not applicable to the questions presented in this proceeding and that Respondent's reading of *Wiley* would expand that decision far beyond the intention of this Court, would avoid the distinction of *Wiley* made by this Court in *NLRB* v *Burns International Security Services, Inc.*, and would make *Wiley* contrary to *Burns*.

ARGUMENT

THE DECISION OF THIS COURT IN *WILEY* DOES NOT SUPPORT THE DETERMINATION OF THE SIXTH CIRCUIT BELOW

In its decision below, the Sixth Circuit Court of Appeals concluded that resolution of this case is dependent upon proper construction of the decisions of this Court in *John Wiley & Sons* v *Livingston* [1] and *NLRB* v *Burns International Security Services, Inc.* [2] However, the court below misread *Wiley*, and incorrectly held that *Wiley* is applicable to the facts of this case. In so doing, the Sixth Circuit has reached a result wholly inconsistent with *Burns*, and its decision must therefore be reversed.

Similarly, Respondent has relied extensively upon *Wiley*. Respondent urges that *Wiley* be interpreted as standing for the proposition that Petitioner is a successor employer even though it hired only a miniscule number of Grissoms' employees which represented a minority of the work force with which Petitioner commenced business operations. Respondent also urges that *Wiley* requires that the process of arbitration be used to determine whether Petitioner has contractual obligations to Respondent.

Wiley is Clearly Distinguishable

Respondent's fundamental allegation is that the instant case "is identical to *Wiley*". [3] Respondent's error in this regard is clearly demonstrable. *Wiley* is a carefully circumscribed case, both by its facts and by the issues it seeks to resolve. Additionally, its holding is a very narrow one, [4] and so this Court has repeatedly

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[1] 376 U.S. 543 (1964).

[2] 406 U.S. 292 (1972).

[3] Respondent's Brief at 12, 41.

[4] "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here the successor employer may be required to arbitrate with the union under the agreement." 376 U.S. at 548.

recognized.[5]

Factually, *Wiley* is clearly distinguishable.[6] There, all of the employees of the prior employer became employees of the newly-merged corporation. Here, only a few employees of Grissoms (nine of thirty-three in one unit, zero of nine in the other) became Petitioner's employees. In *Wiley*, suit was filed to compel arbitration of grievances relating solely to the former Interscience employees assimilated by Wiley, arising subsequent to the merger, and related to the conditions of employment established by Wiley. Here, suit was filed before the purchase of assets to compel arbitration not of grievances pertaining to the former Grissoms employees hired by Petitioner but of the extent of application of the Grissoms' labor contract to the whole of Petitioner's work force. Additionally, in *Wiley* the original employer had disappeared by merger and no longer retained separate corporate existence for purposes of participation in arbitration. Here, the original employer was a party to this proceeding and has stipulated that it accepts arbitration of claims of the Union and grievances of its employees under its collective bargaining agreement.

The issues sought to be resolved through arbitration in *Wiley* differ greatly from those proposed by Respondent. At issue in *Wiley* was whether an employer could be required to submit to arbitration grievances of its own employees arising while those employees worked for that employer, even though it had not signed the collective bargaining agreement upon which the griev-

---

[5] In *Burns* this Court said that *Wiley's*

> "... holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." 406 U.S. at 286.

In *Golden State*, this Court said that, in *Wiley*,

> "We held that the disappearance of the contracting corporation by merger did not necessarily terminate the rights of employees guaranteed by the agreement..." 94 S. Ct. at 424.

[6] It must be noted that, factual distinguishability aside, many observers are not willing to concede *Wiley* any remaining validity after *Burns*, and urge its immediate repudiation. See, e.g., Benetar, *Successorship Liability Under Labor Agreements*, 1973 Wis. L. Rev. 1026 (1974). See also, Amicus Brief of United States Chamber of Commerce, submitted in this cause.

ances were based. The issue here does not concern arbitration of grievances arising in the course of employment by Petitioner; rather, here the issue is whether Petitioner must arbitrate whether employees of another employer, represented by Respondent but not hired by Petitioner, should have contract rights, including employment status, enforceable against Petitioner. [7]

This Court held in *Burns* that a contract of a predecessor employer does not continue in effect as to a subsequent employer, although a union can retain its status as bargaining representative should the majority of the new employer's work force consist of employees of the predecessor. Contract survival, in whole or in part, was unanimously rejected by this Court in *Burns* as running counter to the national labor policies of freedom of contract, employee free choice in the selection of bargaining representatives, and reliance upon relative economic strengths to achieve industrial peace.

Respondent urges that this Court's mandate in *Burns* be ignored on the basis that *Burns* was decided on appeal from a Board proceeding while the instant case is on appeal from a court proceeding. Thus, Respondent seeks to develop a dichotomy in federal labor law, with choice of forum playing a critical role in ascertaining the rights and duties of employees and employers

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[7] Wiley clearly does not support such a theory, and Respondent's difficulty with the carefully limited holding of *Wiley* is exemplified by Respondent's statement that:

> "... if one reads *Wiley* correctly, and the Company's reading is not even arguable, the Union is plainly entitled to an order directing Howard Johnson to arbitrate the scope of its obligations to the Union and the employees it represents under the agreement between the Union and Grissoms. And, again contrary to Co. Br. 22, that is all that the judgment below does; it does not 'apply the former contract to the entire labor force'." Respondent's Brief at 17-18.

If Respondent means to suggest that now it wishes to arbitrate only the extent to which Petitioner has a duty to satisfy grievances arising under the prior labor contract and limited to the few Grissoms' employees hired by Petitioner, the entire complexion of this case is changed. The Sixth Circuit decision below contains no such qualification, nor has Respondent suggested such qualification until now. The peculiarity of Respondent's statement is further emphasized if one considers that Petitioner hired no Grissoms employees to work in the motel. Does the Respondent now suggest that the motel contract did not survive since Respondent hired no Grissoms employees?

alike. The Sixth Circuit below, in full recognition of the created problems of dichotomy and forum-shopping, has held *Burns* inapplicable to the present proceeding. In so holding, the Sixth Circuit has misconstrued both national labor policy and the proper role of arbitration in a collective bargaining contract.[8]

The Effect of *Lion Dry Goods*

Respondent fails to distinguish between contract enforcement and contract survival, as illustrated by its citation of *Retail Clerks* v *Lion Dry Goods*.[9]

Lion Dry Goods was a suit under §185 by a union to enforce the grievance provision of a strike settlement agreement executed by the union and an employer with whom the union had previously had a collective bargaining relationship. During contract renewal negotiations bargaining broke down, and a strike ensued which lasted longer than a year. Through the efforts of a mediation body the strike was ultimately resolved and the settlement agreement signed. In the agreement the union agreed that it was not the exclusive bargaining agent of the employees. Subsequent to the execution of the agreement grievances arose and were submitted to arbitration, but the employer failed to comply with the arbitral awards, and the union instituted suit for enforcement. This Court held that such a suit could be maintained, even though the union was not the exclusive bargaining representative, it being uncontradicted that a present agreement was validly in effect between the two contracting parties, and that the purpose and design of the agreement was to achieve labor peace. Consequently, this Court in *Lion Dry Goods* was concerned solely with the

[8] The Sixth Circuit held that despite *Burns*, an arbitrator can hold that provisions of the contract of the predecessor continue in effect on a selective, not an all-or-nothing basis. The Court ignored the contract arbitration provision which states that the arbitrator shall have no ". . .authority to add to, subtract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be the subject matter of any grievance or arbitration procedure." A. 90a.

[9] 369 U.S. 17 (1962).

enforcement of a valid labor contract.[10] This Court expressly did not decide

> . . . whether minority unions may demand that employers enter into particular kinds of contracts . . .[11]

This is precisely the critical distinction which Respondent has missed. The case at bar concerns not the enforcement of a valid labor contract executed between the two parties here present, but the survival so far as Petitioner is concerned of a labor contract executed between Respondent and another employer. If Petitioner had made some kind of settlement agreement with Respondent, *Lion Dry Goods* says it could be enforced even though Respondent does not represent a majority of Petitioner's employees. However, *Burns* says the agreement between Respondent and Grissoms did not survive the transfer of the business operation from Grissoms to Petitioner.

Arbitration is a Process of Dispute Resolution Established Under Collective Bargaining Contracts Voluntarily Executed

The expansive interpretation of *Wiley* adopted by the court below and argued by Respondent misconstrues the role of arbitration in the scheme of our federal labor policy. Arbitration is part and parcel of the collective bargaining process. When dispute develops between consenting parties to an agreement as to the interpretation of that agreement, arbitration is a procedure used as a terminal point for resolving that dispute rather than resort to the economic weapons of lockout and strike. The arbitrator, constrained by the confines of the contract, interprets and construes the agreement, and his decision as to contract meaning is not sub-

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[10] That such is the case is clearly underscored by this Court's citation of *Lion Dry Goods* in *Wiley* for the following proposition:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks* v *Lion Dry Goods*." 376 U.S. at 551.

[11] 369 U.S. at 28.

ject to review. Yet, under the proposed interpretation of *Wiley*, the arbitrator's role is expanded so that he is given authority to determine both whether the contract initially applies to the employer and the extent to which it applies.

This contention is contrary to the declarations of this Court in its recent decision in *Gateway Coal Co.* v *United Mine Workers*, [12] wherein this Court stated:

> No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so. 42 U.S.L.W. at 4097.
>
> * * *
>
> The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), states in part:
>
> > Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. 42 U.S.L.W. at 4098.

Additionally, this Court, in *Alexander* v *Gardner-Denver*, [13] further emphasized the role of arbitration when it quoted with approval the following statement of Dean Shulman:

> A proper conception of the aribtrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of industrial self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. Shulman,

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[12] 42 U.S.L.W. 4095 (U.S. Jan. 8, 1974).

[13] 42 U.S.L.W. 4214 (U.S. Feb. 19, 1974).

> Reason, Contracts and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955). 42 U.S.L.W. at 4219.[14]

Respondent invites this Court's attention to *Alexander* v *Gardner-Denver*, but for a different purpose. Respondent seeks to show that the inherent conflict between the Sixth Circuit's decision and *Burns* is reconciliable because "disputed transactions may implicate both contractual and statutory rights". That *Gardner-Denver* dealt with election of rights rather than election of forums is not addressed by Respondent. The issue here is not one of vindication of a variety of rights, but the legality of imposing on Petitioner a contractual obligation to which Petitioner at no time consented and which the great majority of Petitioner's employees have at no time requested or accepted. Certainly, an employee discharged because of union activities may have a remedy before the National Labor Relations Board even though he has no remedy for breach of a collective bargaining agreement. Likewise, an employee discharged for reasons other than union activities may have a claim for breach of a collective bargaining agreement even though he has no remedy before the Board. In some cases the same act may constitute both a breach of a collective bargaining agreement and a violation of the National Labor Relations Act.[15] However, the fact that an employee may have different rights under a contract, as was the case in *Gardner-Denver*, and therefore may have different remedies in different forums, does not mean that whether or not a contract survives should be decided differently by different forums.

Under the guise of *Wiley*, Respondent seeks to impose a labor agreement on a nonconsenting party. This will not foster industrial stability. As this Court said in *Burns*:

> Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties. 406 U.S. at 288.

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[14] See also, Regulations, Federal Mediation and Conciliation Service, 29 C.F.R. §1404.1: "The labor policy of the United States Government is designed to foster and promote free collective bargaining. Voluntary arbitration is encouraged by public policy . . . "

[15] See, e.g., *Smith* v *Evening News Association*, 371 U.S. 195 (1962).

Moreover, as clearly recognized in *Burns*, "holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities".

Such inequities result whether the labor agreement is applied to the unconsenting employer or union either selectively or in whole, whether by an arbitrator or by the Board.

It must be noted that, under Respondent's argument, arbitration can lead to the acquisition of bargaining rights against Petitioner – a result which flies in the face of *Burns*. If, through arbitration, Respondent can force Petitioner to recognize seniority rights of Grissoms' employees, Petitioner would have to replace the employees it has hired with those of Grissoms. Once a majority of Petitioner's labor force consisted of Grissoms' employees, Respondent would attain the status of the bargaining representative of all the employees. Thus, through arbitration, Respondent would be able to acquire bargaining rights it does not now possess. This further illustrates the fallacy of Respondent's argument for differentiating between § 158 and § 185 in terms of the labor policies from which they draw substance and meaning. One section cannot be used to circumvent another.

At the heart of this controversy is whether Howard Johnson can employ its own labor force, set its own terms and conditions of employment, and structure its operations free from the constraints of collective bargaining agreements which it neither negotiated nor adopted. Respondent seeks through arbitration to circumscribe Petitioner in exactly the same way as the prior employer, Grissoms. Yet, it is this very result which this Court rejected in *Burns:*

> The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted.

> Given the continuity of the employment relationship, the preexisting contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. 406 U.S. at 288-89.

Reversal of the Sixth Circuit below will not, as Respondent claims, run counter to the oft-expressed presumption of arbitrability or undermine the viability of arbitration, for the Sixth Circuit announces a principle of compulsory, rather than voluntary, arbitration. Arbitration achieved its significant role in the free collective bargaining process prior to *Wiley*, and it will continue to prove useful and beneficial without need of expanding the role of arbitration so as to permit the imposition of labor agreements on unconsenting parties. Seen in the context of the national labor goals and the clearly identified policies enunciated in this Court's *Burns* decision, the arbitral forum is appropriate and intended as an expeditious means within the free collective bargaining process to resolve disputes as to contract interpretation between parties who have consented to the contract. Conversely, the arbitral process is inappropriate and totally inconsistent with national labor policies if used as a means for imposing contract terms, either in whole or in part, upon a nonconsenting party.

Viewed in historical perspective, this Court has consistently recognized and emphasized that the Congressional mandate is voluntarism in the collective bargaining relationship:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever .... The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. *NLRB* v *Jones & Laughlin Steel Corp.*, 301 U.S. at 45.

This policy has subsequently been codified in § 158(d) of the Act.

In *H. K. Porter Company, Inc.* v *NLRB*, 397 U.S. 99 (1970), this Court recently reaffirmed this fundamental national labor policy:

> One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract. 397 U.S. at 108.

In their dissenting opinion in *H. K. Porter*, Justices Douglas and Stewart, in agreement with the majority's statement of the underlying purposes of the Act, stated:

> The Court correctly describes the general design and main thrust of the Act. It does not encompass compulsory arbitration; the Board does not sit to impose what it deems to be the best conditions for the collective-bargaining agreement; the obligation to bargain collectively 'does not compel either party to agree to a proposal or require the making of a concession.' 397 U.S. at 110.

In *Burns*, this Court again re-emphasized that voluntarism is the basis of the national labor policies:

> Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and 'allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'. 406 U.S. at 287.

Despite these consistent pronouncements spanning some thirty years of the development of federal labor law, Respondent urges a wholly contrary position. In so doing, Respondent seeks to expand *Wiley* so as to swallow up the very foundation of federal labor laws.

CONCLUSION

As has been shown, the decision of the Sixth Circuit below goes far beyond the limited holding of *Wiley*. The decision, if allowed to stand, would effect a dramatic shift away from the steady progression of federal labor law favoring uniformity, voluntarism, and employee free choice. The decision of the Sixth Circuit below should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENT

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MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENT

Detroit Local Joint Executive Board, the respondent in this case, pursuant to Rule 41(5) and (6) of the Rules of this Court, hereby moves for leave to file the accompanying brief bringing to this Court's attention, and discussing, a "late authority * * * that [was] not available in time to have been included in [its] brief in chief." In support of this motion the Union shows as follows:

1. The Union's brief was filed on March 1, 1974, and this case was argued on March 19 and 20.

2. On April 1, 1974, the decision in *Teamsters Local 249* v. *Bill's Trucking, Inc.*, ... F.2d ....., 85 LRRM 2713 (C.A.3) (issued March 13, 1974) (hereafter "*BTI*") was first unofficially reported.

3. In the *BTI* opinion (attached at pp. 1a-15a *infra*) the Third Circuit treats in a parallel setting with the issues also presented in the instant case.

CONCLUSION

For the above-stated reasons this motion for leave to file a supplemental brief should be granted.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

Teamsters Local 249 v. *Bill's Trucking, Inc.*, ... F.2d ..... 85 LRRM 2713 (C.A.3) (hereafter "*BTI*"), like the instant case, raised the issues whether contractual rights, embodied in a collective agreement between a union and his predecessor, are enforceable against the new owner of a business, and, if so, under what circumstances and to what extent. There, as here, the defendant contended that after this Court's decision in *NLRB* v. *Burns International Security Service*, 406 U.S. 292 (hereafter "*Burns*"), no obligations under a collective agreement are enforceable against a successor in a § 301 suit. This position was unanimously

rejected by the Third Circuit. Circuit Judge Adams' opinion, in which Rosenn C.J., and Sheridan D.J., joined, is appended hereto; we therefore summarize only three major points.

1(a). In rejecting the contention that *Burns* controls in § 301 cases, the Third Circuit first explained that "in the law of labor relations the successorship • • • question arises in various contexts and no single formula for its resolution has been developed by the federal courts." (P. 4a *infra.*) And the Court of Appeals found further support for its conclusion in the rationale of *Burns* itself:

> "The Supreme Court • • • grounded its *Burns* decision, at least in part, on the policy voiced in section 8[(d)] of the National Labor Relations Act, • • •. Section 8, of course, governs unfair labor practice proceedings, • • •. The present proceeding, on the other hand, is *not* a section 8 case, and, though the policies embedded in that section may have some residual effect, they would not appear to be *directly* controlling in this breach of contract action." (P. 7a *infra;* emphasis in original.)

The Third Circuit also noted that a "further limit [on] the impact of *Burns* on the doctrine of successorship in general" is that "the prior and subsequent employers in *Burns* were, as the Supreme Court noted, entirely unrelated—there was no 'successor' to the assets, stock or other corporate aspects of the prior employer." (P. 7a *infra.*) Accordingly, Judge Adams concluded, "That the ramifications of *Wiley* [v. *Livingston,* 376 U.S. 543] survive *Burns* cannot be doubted." (P. 8a *infra.*)

(b). That conclusion, of course, does not deprive *Burns* of its vitality. For, it reads *Burns* as a decision which does

not retrench the courts' authority under § 301 as declared in *Wiley*, but which *does* reestablish a limitation on the Board's authority under § 8 understood and accepted at the time this Court decided *Wiley*. As the Third Circuit appreciated, if, however, the contrary conclusion—that the obligations created by a collective agreement terminate with a change of ownership even though there is substantial continuity in the business enterprise—is accepted, the policies upon which *Wiley* was based would be severely undermined:

> "For example, an employer dissatisfied with the terms of a validly negotiated labor agreement might seek to avoid them by a sale of his business to a third party, in effect working a unilateral termination of the employees' contract rights." (P. 12a *infra;* footnotes omitted.)

In *Wiley* this Court had reasoned:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." (376 U.S. at 550; see also, *Golden State Bottling Co.* v. *NLRB*, —— U.S. ——, 42 U.S.L.Wk. 4039, 4043.)

The "prerogative of owners" to make basic decisions regarding the future of the enterprise, and the limitations thereon with respect to the interests of the affected employees, are central to the Act. Compare Mr. Justice Harlan's opinion, again for a unanimous Court, in *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263; see also

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203, 217-226, Stewart, J. concurring. Thus, it would disrupt the balance struck by the Act to allow the exercise of this "rightful prerogative" to destroy the contractual rights and to frustrate the legitimate expectancies of the employees.

2. The *BTI* Court held that the contract between BTI and the union did not neccessarily survive in its entiret[y]. (Pp. 10a, n.27, 14a-15a *infra*.) In this respect the holding of the Third Circuit is identical to the holding of the Sixth Circuit herein, even as both differ from the Board's "all-or-nothing" approach in *Burns*. (See Pet. App. pp. 10a-11a.) But we should note that this portion of the Third Circuit's opinion also deals with the one salient difference between *BTI* on the one hand and *Howard Johnson* and *Wiley* on the other: Because there was no arbitration clause in the contract between BTI's predecessor and the union, the task of interpreting that contract to determine the scope of BTI's obligations under the contract was left to the trial court on remand. Unlike *Wiley* and the decision of the Sixth Circuit herein, that of the *BTI* Court therefore lacks support in "the impressive policy considerations favoring arbitration," (*Wiley*, 376 U.S. at 550).

3. In *BTI* the new owner hired none of the employees covered by the collective bargaining agreement, and the union's precise claim was that he breached his contractual duty by failing to do so. (See pp. 2a-3a *infra*.) Compare *Wiley* where "the union's demands collectively raise[d] the question which underl[ay] the whole litigation: What is the effect of the merger on the rights of covered employees?" (376 U.S. at 555.) If, as Howard Johnson argues

here, a new owner is a successor only when a majority of his workforce is composed of his predecessor's employees (Pet. Br. pp. 7-32), summary judgment in BTI's favor would have been appropriate. But the Third Circuit, in accord with the Sixth and Second (see pp. 21-24 of our brief) read no such self-destructing limitation into the successorship doctrine under § 301 as stated in *Wiley*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GENERAL TEAMSTERS, CHAFFEURS AND HELPERS, LOCAL UNION NO. 249, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA v. BILL'S TRUCKING, INC., FORMERLY KNOWN AS ENICK TRUCKING INC. (No. 73-1495, MARCH 13, 1974.)

Before ADAMS and ROSENN, Circuit Judges, and SHERIDAN, District Judge.

ADAMS, Circuit Judge:—The question to be resolved on this appeal is whether a collective bargaining agreement, entered into between a corporation and a union representing its employees, is necessarily terminated when all of the corporation's capital stock is sold and the new owner then changes the name of the corporation. The district court, relying on NLRB v. Burns Security Services, Inc.,[1] dismissed the complaint on the ground that the labor agreement was so terminated, and the union has appealed.

Since the district court summarily dismissed the union's complaint,[2] we must view the facts in the light most favorable to the plaintiff union. In 1967, a collective bargaining contract was entered into by the General Teamsters Local Union ("the Union") and Enick Trucking, Inc. ("ETI").[3]

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[1] 406 U.S. 272, 80 LRRM 2225 (1972).

[2] The district court treated the motion as a motion for summary judgment.

[3] The terms of the agreement were contained in the National Master Freight Agreement, and the Local Cartage Supplement Agreement of the Teamsters Joint Council No. 40, Freight Division. Both of these agreements became effective on April 1, 1967.

That contract, by its terms, was to remain in force for a period that included January 19, 1972.[4] ETI was a motor carrier, and prior to January 18, 1972, all of its issued and outstanding stock was owned by one Walter Enick.

By an agreement of sale dated January 18, 1972, Enick agreed to sell all of his stock in ETI to one William Fiore, for cash. The same was consummated on that same day, and Fiore thereafter transferred all the ETI stock to Diamond Excavating and Hauling, Inc. Fiore was the sole stockholder of Diamond. On the date Enick sold his ETI stock to Fiore, the only assets of ETI were certificates of public convenience issued by the Pennsylvania Public Utility Commission, several tractors and trailers, and a truck. The agreement of sale provided that all liabilities incurred by ETI prior to the January 18, 1972 closing were to be the responsibility of Enick.

Within 30 days of the sale of ETI stock to Fiore, the name of the corporation was changed to Bill's Trucking, Inc. ("BTI"). BTI has engaged, since the sale, in the business of motor carriage, almost the identical business in which ETI was engaged.

The dispute in this case arises from the failure of BTI to retain in its employ nine truck drivers represented by the Union. These drivers had been employed by ETI, and the conditions of their employment were set forth in the collective bargaining contract between the Union and ETI.

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[4] The agreement provided, *inter alia*, that it "shall be binding upon the parties hereto, their successors, administrators, executors and assigns."

According to the complaint, the drivers were discharged by BTI on January 19, 1972, the day after the sale of ETI stock to Fiore.[5]

The Union brought a breach of contract action against BTI, availing itself of the jurisdiction conferred by section 301 of the Labor-Management Relations Act ("LMRA").[6] The Union maintained that the collective bargaining contract between it and ETI survived the sale of the ETI stock to Fiore, that BTI thus was bound by that contract and that the discharge of the nine drivers transgressed the terms of the contract. Accordingly, the Union sought damages for the allegedly wrongful discharge of the drivers.

BTI, besides controverting several of the factual allegations of the complaint, interposed a motion to dismiss. The district court, in dismissing the case, reasoned that since, under its view of Burns Security Services, supra, "a successor employer is not bound by the contract between the Union and its predecessor," BTI was not obligated to honor

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[5] BTI alleges that it offered employment to the nine drivers, but not under the conditions and terms of the ETI-Union agreement; that this offer was refused; and that, in any event, ETI discharged the nine drivers on January 18, 1972, prior to the sale of ETI stock to Fiore.

[6] 29 U.S.C. § 185.

The Union also brought unfair labor practice charges against BTI before the National Labor Relations Board, which dismissed the charges. BTI argues that this fact, together with the holding in Burns Security Services, should preclude entertainment of this 301 action. This contention is without merit. Cf. Smith v. Evening News Ass'n, 371 U.S. 195, 51 LRRM 2646 (1962). Of even less force is BTI's contention that the Board order entered against ETI, in another Board proceeding brought by the Union, should bar any action by the Union against BTI under section 301.

the provisions of a collective bargaining agreement entered into by ETI and the Union. In so holding, the district court appears to have misapprehended the thrust of the Burns decision and, perhaps, the implications for this case of the labor law doctrine of "successorship."[7] Accordingly, we reverse.

Broadly stated, in the law of labor relations the successorship issue deals with the extent to which an employer is obligated to honor the legal relations established between another employer and a union. The question arises in various contexts,[8] and no single formula for its resolution has been developed by the federal courts. The district court, in summarily rejecting the Union's claim, relied exclusively on the Supreme Court's recent treatment of the successorship concept in Burns Security Services, supra. As the

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[7] "Successorship," as a generic term, refers to that matrix of labor law doctrine that is called into play "where the identity of the employer changes after the employees have won officially recognized collective power to press their demands against their prior employer." Slicker, A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051 (1973).

[8] For example, the issue in any given successorship case may involve, *inter alia:* (1) the survival of the union's status as exclusive bargaining agent of the former employees and the new employer's duty to recognize and bargain with this union; or (2) the power of the National Labor Relations Board to order the new employer to remedy unfair labor practices committed by the prior employer; or (3) the extent to which the new employer may be compelled to arbitrate under the former employer's collective bargaining agreement; or (4) the extent to which the new employer is bound by the substantive provision of the collective agreement in effect at the time of succession. See Slicker, supra, at 1064. These questions may arise in the context of an unfair labor

Supreme Court emphasized,[9] however, the decision in that case was an exceedingly narrow one. The pronouncements laid down in Burns, therefore, can hardly be read to settle every successorship problem that may arise.

In Burns, Wackenhut, an employer, was under contract to provide security services at an airport. A union, the UPGW, was certified as exclusive bargaining agent for the Wackenhut security employees, and negotiated a three-year collective bargaining agreement with Wackenhut. Wackenhut's contract with the airport operator expired shortly thereafter, and, after competitive bidding, Burns Security Services was awarded the security contract by the airport operator. Burns retained 27 of the 42 Wackenhut employees at the airport, but declined to honor the terms of the UPGW collective agreement with respect to the retained employees. In addition, Burns refused to recognize or bargain with the UPGW.

The UPGW filed an unfair labor practice complaint with the Board pursuant to section 8 of the National Labor Relations Act, alleging that Burns was a "successor" to Wackenhut, and that therefore its refusal to honor the terms of the collective agreement, or to recognize and bargain with the Union, constituted unfair labor practices under section 8 of the National Labor Relations Act ("NLRA").[10]

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practice case, of a suit for breach of a labor agreement, or in an action to enforce an NLRB order.

[9] Justice White, writing for the majority in Burns, noted that "Resolution [of that case] turns to a great extent on the precise facts involved. . . ." 406 U.S. at 274.

[10] Specifically, the union alleged violations of §§ 8(a)(1), (2) and (5), 29 U.S.C. § 158(a)(1), (2) and (5).

After proceedings before the NLRB and in the court of appeals, the Supreme Court held, first, that Burns *was* obligated to recognize and bargain with the UPGW. This holding was predicated upon the fact that NLRB had certified the bargaining unit as an appropriate one, and the fact that Burns had retained a majority of the old Wackenhut employees.[11]

The Supreme Court then focused upon the other question in dispute: whether Burns "was bound to observe the substantive terms of the collective-bargaining contract that the union had negotiated with Wackenhut and to which Burns had in no way agreed."[12] The Court, relying principally on the history and evident purpose of section 8(d) of the National Labor Relations Act,[13] held that Burns was *not* bound by the terms of the UPGW-Wackenhut agreement. It stated that:

> "[H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities."[14]

The district court here seized upon this holding in Burns, and magnified it into a sweeping interdiction against the enforcement of labor agreements against any putative "successor" employer. Analysis of the Burns opinion convinces us, however, that its significance is largely limited to the particular facts of that case and, in any event, that it is not controlling in the circumstances presented here.

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[11] See 406 U.S. at 278-79.

[12] Id. at 282.

[13] 29 U.S.C. § 158(d).

[14] Id. at 288.

Burns, it will be recalled, was an unfair labor practice case, not a suit under Section 301 of the LMRA for breach of a labor agreement. The Supreme Court thus grounded its Burns decision, at least in part, on the policy voiced in section 8 of the National Labor Relations Act, which expressly declines to "compel either party [to a labor negotiation] to agree to a proposal or require the making or a concession."[15] Section 8, of course, governs unfair labor practice proceedings, and thus the result in Burns may be viewed as following directly from the explicit statutory policy. The present proceeding, on the other hand, is *not* a section 8 case, and, though the policies embedded in that section may have some residual effect,[16] they would not appear to be *directly* controlling in this breach of contract action.

Moreover, the prior and subsequent employers in Burns were, as the Supreme Court noted, entirely unrelated—there was no "succession" to the assets, stock or other corporate aspects of the prior employer. Indeed, even after Burns took over the security operation at the airport, *both* Burns and Wackenhut continued as ongoing enterprises. These factual circumstances further limit the impact of Burns on the dictrine of successorship in general.[17]

That there is no *absolute* bar to the enforcement of labor agreements against "successor" employers in section 301

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[15] See Burns Security Services, supra, 406 U.S. at 282-83.

[16] See Slicker, supra, at 1099.

[17] Justice Rehnquist concurring and dissenting in Burns, observed that the majority "studiously avoids using the term 'successorship' . . . .," 400 U.S. at 296, presumably because the case involved no corporate succession.

actions, such as this, is amply illustrated by the decision in John Wiley and Sons, Inc. v. Livingston.[18]

In Wiley a union brought an action pursuant to section 301 to compel arbitration under a collective bargaining agreement executed by a company which the defendant had acquired by merger. The Court, basing its decision in generous part on the strong national policy favoring arbitration,[19] held that, in some circumstances, the terms of a predecessor's labor agreement may be enforced against a successor employer in section 301 actions.[20]

That the ramifications of Wiley survive Burns cannot be doubted.[21] True, the Court in the latter case found no support in Wiley for the proposition that "Burns be treated under the collective-bargaining contract exactly as Wackenhut would have been, if it had continued protecting the [airport]."[22] But it was specifically emphasized in Burns

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[18] 376 U.S. 543, 55 LRRM 2769 (1964).

[19] See 376 U.S. at 549, 550; Cf. Gateway Coal Co. v. United Mine Workers of America, 85 LRRM 2049, 42 LW 4095 (U.S., Jan. 8, 1974); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1961).

[20] 376 U.S. at 548. Though the holding in Wiley was necessarily limited to establishing the successor's contractual duty to arbitrate, the case, as a practical matter, implies more. This is manifest from the fact that the very question upon which the successor must, under Wiley, submit to arbitration, is the extent to which the *other* terms of the predecessor's contract are binding on the successor. See Burns Security Services, supra, 406 U.S. at 285; Slicker, supra, at 1098.

[21] See Detroit Local Joint Executive Bd. v. Howard Johnson Co., Inc., 482 F.2d 489, 83 LRRM 2804 (6th Cir. 1973), cert. granted, 42 LW 3351 (Dec. 11, 1973).

[22] 406 U.S. at 285.

that "Wiley arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d)."[23]

Burns, then, cannot be read to foreclose absolutely the imposition upon a successor employer of the contract obligations entered into by its predecessor. The district court apparently thought otherwise, notwithstanding intimation by the Burns Court that a contract may survive "in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchased. . . ."[24]

The district court's misapprehension of the force of Burns led, understandably, to its belief that, regardless of what might be proved at trial, the Union could not enforce against BTI its contract with ETI. Wiley and other cases seem to weight in favor of remanding this case for a trial to determine first, whether BTI was, in fact, the same corporation with which the Union had a contract, or if not, whether there nonetheless existed such "substantial con-

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[23] Id. It should be noted here that at least one commentator has found the Burns Court's distinction between unfair labor practice cases and section 301 actions less than persuasive. See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 255 (1972). On the other hand, the same commentator points out that, under Burns and Wiley, "an arbitrator may order enforcement of the predecessor's agreement against the successor employer but . . . the NLRB may not." Id. at 256.

[24] Id. at 291. The continuing vitality of Wiley is evidenced by the recent decision in Golden State Bottling Co. v. NLRB, 84 LRRM 2839, 2845, 42 LW 4039, 4043 (U.S., Dec. 5, 1973): "We held [in Wiley] that the disappearance of the contracting corporation by merger did not, necessarily terminate *the rights* of employees guaranteed by the agreement. . . ." (Emphasis added.)

tinuity of identity in the business enterprise''[25] before and after the sale to Fiore that the terms of the contract may appropriately be deemed to have weathered that sale.[26]

The Union's pleadings and affidavits indicate that BTI, far from being a distinct corporate entity, was the "same corporation" as ETI. Were the district court to find, after considering the evidence, that such absolute identity of business enterprise existed, both our national labor law and general corporate law[27]—and perhaps plain common sense—would require the enforcement against BTI of the Union-ETI contract.[28] Should the district court determine

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[25] John Wiley & Sons, Inc., supra, 376 U.S. at 551.

[26] Upon remand, the district court might determine that the facts of this case warrant enforcement against BTI of all, some, or none of the ETI-Union contract provisions. For example, if it is found that that contract was entered into by the Union with the specific understanding that its terms would not be deemed to survive a sale of the controlling interest in the corporation, it should not be enforced against BTI. Another issue of fact to be determined, of course, is whether there existed a contract between the Union and ETI prior to the sale, and, if so, what its terms were.

[27] Cf. W. Fletcher, Private Corporations § 7121 (1961 ed.).

As a matter of corporate law, it would seem that a corporation cannot unilaterally terminate a labor agreement simply because a change in the capital ownership of the corporation occurs. In the context of federal labor law, however, " [s]tate law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case, . . . but the law which ultimately results is Federal." John Wiley & Sons, Inc., supra, 376 U.S. at 548.

[28] Semantically and analytically, the phrase "substantial continuity of identity" may be taken as inclusive of "absolute identity." Thus, if BTI is found to be the "same" corporation as ETI, there would exist, *ipso facto*, a "substantial continuity."

Of course, the fact that a transfer of a corporate entity takes

that BTI was *not* the "same" corporation as ETI, the doctrine of successorship, properly applied, may still require the imposition upon BTI of the contract terms.

In Golden State Bottling Co. v. NLRB,[29] decided after Burns, the Supreme Court noted that:

> "When a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as unaltered."[30]

Likewise, when one person simply purchases all the capital stock of a company with outstanding labor contract obligations, the employees of the purchased company will naturally view *their* "job situations as unaltered."[31] In such a case—where an absolute identity or a "substantial continuity" of the business enterprises exists—those employees, except in unusual circumstances, may well be entitled to the contractual benefits of their pact with the prior employer.

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the form of a sale of a controlling stock interest might not, in every case, justify the conclusion that there existed either a "substantial continuity" or an absolute identity as between the pre- and post-sale employers. Thus, for example if a large, diversified corporation acquired from a small corporation the latter's sole asset, for use in a field unrelated to anything the small corporation had engaged in, and the acquisition was affected by a purchase of all the small corporation's stock, there might be reason to conclude that the large corporation was not bound by labor contracts entered into by the acquiree.

[29] 84 LRRM 2839, 2845, 42 LW 4039 (U.S., Dec. 5, 1973).

[30] Id. 84 LRRM at 2845, 42 LW at 4044.

[31] The district court characterized the sale of stock from Enick to Fiore as a sale of assets. In light of the allegations of the complaint, we do not share the district court's view of the transaction.

The possible consequences of a contrary view could have disturbing implications. For example, an employer dissatisfied with the terms of a validly negotiated labor agreement might seek to avoid them by a sale of his business to a third party, in effect working a unilateral termination of the employees' contract rights.[32] This Court and other courts, aware of such possibility, have consistently held, in breach of contract cases under section 301, that a finding of "substantial continuity" may warrant the conclusion that a successor is bound by the terms of a prior employer's labor contract.[33]

In United Steelworkers v. Reliance Universal, Inc.,[34] a section 301 action brought by a union, this Court held that a collective bargaining agreement between a union and an employer "remained the basic charter of labor relations" as against a successor employer.[35] The groundwork of the holding in Reliance was furnished by the fact, that, after the sale of a plant to the successor, the business operation

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[32] Similar to this hypothetical instance are the "alter ego" cases, in which a technical change in employer identity is undertaken in the former employer's attempt to disguise its continuance and so mask an unlawful motive to avoid the commands of the national labor laws. Courts have not been misled by the disguised continuance, and have imposed labor obligations upon the "alter ego" enterprise. See, *e.g.*, NLRB v. Southport Petroleum Co., 315 U.S. 100, 9 LRRM 411 (1942); NLRB v. Weirton Steel Co., 135 F.2d 494, 12 LRRM 693 (3d Cir. 1943).

[33] Another possibility is that two merging companies, each under contract with separate unions, will seek to arrange the merger terms in such a way as to squeeze out the more powerful of the two unions, or to avoid the more disadvantageous contract.

[34] 335 F.2d 891, 56 LRRM 2721 (3d Cir. 1964).

[35] Id. at 895.

"continued without significant change." Moreover, the Court imposed contractual obligations on the successor in the face of a provision in the agreement of sale that the "Buyer shall not assume any obligation of the . . . seller under any collective bargaining agreement. . . ."[36]

The Ninth Circuit has consistently honored the principle that, in section 301 actions, a substantial continuity of business enterprise may justify the imposition of contract terms upon a successor employer. Thus in Wackenhut Corp. v. Int'l Union, United Plant Guard Workers,[37] there was enforced against a successor an arbitration provision negotiated by the prior employer, whose business and assets had been purchased by the successor.[38] Likewise, in Teamsters, Chauffeurs, Warehousemen and Helpers v. D. S. Billington,[39] another 301 case, the Ninth Circuit held a corporation bound to the labor contract of its predecessor, a sole proprietorship whose assets had been bought by the corporation.

These cases, read in the illumination provided by Wiley, Golden State Bottling, and the Supreme Court's admonition that Burns be construed narrowly, convince us that the district court erred in holding that the Union could not conceivably prove a set of facts that would justify the imposition upon BTI of some or all of ETI's labor obliga-

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[36] Id. at 893. The non-assumption clause in the Union-ETI contract did not refer specifically to labor obligations.

[37] 332 F.2d 954, 56 LRRM 2466 (9th Cir. 1964).

[38] As is alleged in this case, the successor in Wackenhut had declined, in the agreement of sale, to assume the obligations of its predecessor.

[39] 402 F.2d 510, 69 LRRM 2637 (9th Cir. 1968).

tions. The Union's allegations, taken together, assert facts which, if found at trial to be true, indicate that ETI was in reality the same corporation with which the Union had a contract, or that BTI at least represented a "substantial continuity" of business enterprise from ETI to BTI. These factual circumstances, in a section 301 suit for breach of contract, would be sufficient foundation for a conclusion that the discharged drivers may recover whatever damages the contract terms provide.

This is not to suggest, of course, that in every case a successor employer may properly be held to the provisions of his predecessor's labor contract. Thus, for example, where a manufacturing company acquires the assets of another company, intending to put them to use in an entirely new enterprise, it might be inappropriate to bind the acquirer to contracts negotiated with unions whose members' skills are of no utility in the new industry. But where, as here alleged, there is a simple purchase of stock, followed only by a change in corporate name and some minor changes in business operations, the policies of our national labor law weigh heavily in favor of a doctrine that preserves intact the employees' bargained-for rights and duties,[40] or at

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[40] Some evidentiary factors to be considered in determining whether there exists substantial continuity of business enterprise are: (1) geographic continuity, i.e., whether the predecessor and successor are similar in terms of their geographic base of operations, and thus in terms of their employee "markets"; (2) similarity of supervisory personnel; (3) continuity of business operation; (4) similarity of product or service; (5) changes in internal operating methods, i.e., machinery, production methods, inventory, trade name, customers, and methods of financing; (6) form of succession, i.e., whether by sale of stock, assets, incorpora-

least a portion of them. Moreover, enjoyment of the fruits of the collective bargaining process—a surcease of industrial strife, the unimpeded flow of commerce—should not be made to turn on the wooden concept that labor contracts are terminated by any change in corporate identity, no matter how slight and insubstantial.

Summary judgment under Rule 56, Federal Rules of Civil Procedure, is available only when no genuine issue of material fact remains in a litigation.[41] Here, it remains to be decided whether there existed an identity or continuity of enterprise between ETI and BTI. Such determination may be made only after a hearing to determine the pertinent facts of this case.

Accordingly, the judgment of the district court will be reversed, and the case remanded for treatment consistent with this opinion.

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tion of a partnership, dissolution of a partnership, or merger. The lens through which these evidentiary factors should be scanned is, of course, the perspective of the employees. The basic inquiry is whether the change is the structure of the employing enterprise should be deemed to have significantly altered the employment relationship as perceived by the employees. See Slicker, supra, at 1054-1063.

[41] See 10 Wright and Miller, Federal Practice and Procedure § 2712 (1973); Janek v. Celebrezze, 336 F.2d 828, 834 (3d Cir. 1964).

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-631

HOWARD JOHNSON COMPANY, INC.,

Petitioner

v

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 41(5) and (6) of the Supreme Court of the United States Revised Rules, Petitioner Howard Johnson Company, Inc., hereby moves for leave to file the accompanying brief presenting and discussing "late authorities. . .that were not available in time to have been included in [its] brief in chief".

In support of this motion, Petitioner shows as follows:

1. Petitioner's brief in chief was filed January 28, 1974. Petitioner's reply brief was filed March 14, 1974. This cause was argued on March 19 and 20, 1974.

2. On April 1, 1974, the decision in *Teamsters, Local 249* v *Bill's Trucking, Inc.*, _____ F2d _____, 85 LRRM 2713 (3rd Cir., March 13, 1974) was first unofficially reported. On or about May 1, 1974, the decision in *Steelworkers* v *U.S. Gypsum Co.*, _____ F2d _____, 85 LRRM 2962 (5th Cir., April 11, 1974) was first unofficially reported.

3. On April 9, 1974, a motion for leave to file a supplemental brief referring to and discussing *Bill's Trucking* was filed by Respondent and on April 22, 1974, such motion was granted by this Court.

4. Although Petitioner is advised that counsel for Respondent mailed to Petitioner's counsel copies of said motion and brief, such copies were not received and the first time Petitioner's counsel became aware of such filing was upon receipt on April 24, 1974, of a letter from the Clerk of the Court advising that the motion was granted and the brief received.

5. Therefore, Petitioner requests leave to file the attached supplemental brief.

CONCLUSION

For the above-stated reasons, this motion for leave to file a supplemental brief should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR PETITIONER

Respondent has hastened to call to the attention of this Court a decision of the Court of Appeals for the Third Circuit in Teamsters, Local *249* v *Bills Trucking*, Inc.,____ F2d____, 85 LRRM 2913 (March 13, 1974). The case is substantially different from this case, but dicta in the opinion of the court apparently is deemed by Respondent to be worthy of consideration by this Court. Still another Court of Appeals, the Fifth Circuit, has now rendered a decision in the gray area left by this Court's decisions in *John Wiley & Sons* v *Livingston*,[1] and *NLRB* v *Burns International Security Services, Inc.*[2] In *Steelworkers* v *U.S. Gypsum Company*,____F2d____, 85 LRRM 2962 (April 11, 1974), the Fifth Circuit has enforced an arbitrator's decision, applying parts of a prior employer's collective bargaining contract to a successor employer.

The two cases will be discussed below.

Bill's Trucking

Initially it should be noted that *Bill's Trucking* involved a review of a lower court's decision granting the defendant employer's motion for summary judgment. Thus, the facts in the union's complaint were viewed in the light most favorable to the plaintiff union.

Factually, *Bill's Trucking* involved a sale of capital stock from one individual to another. Prior to the stock transfer, the corporation had a labor agreement with the plaintiff union. The Court of Appeals concluded that, based on the union's complaint, the employer involved "was in reality the same corporation with which the union had a contract",[3] and that the employer dismissed its employees either on the day the transfer of stock took place or the next day. The union sued solely for damages occasioned by an alleged breach of the labor agreement, which did not contain a provision for arbitration. The Third Circuit reviewed the lower court's decision granting summary judgment and remanded the case for a factual hearing.

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[1] 376 U.S. 543 (1964).

[2] 406 U.S. 292 (1972).

[3] 85 LRRM at 2718.

Unlike the present case, there was a factual dispute as to whether or not the employees had been retained in employment after the transfer of ownership. Unlike this case, the corporate employer remained unchanged, although stock ownership changed, and at a later date the name of the corporation was changed. Unlike this case, the union sought damages for breach of the contract rather than submission to an arbitrator of the question whether some of the provisions of the contract should be deemed to continue in effect, binding on a new employer.

In rendering its decision, the Third Circuit was confronted with this Court's decisions in *John Wiley & Sons* v *Livingston* and *NLRB* v *Burns International Security Services, Inc.* It elected to restrict *Burns* and read into *Wiley* unjustified implications. In so doing, the Third Circuit based its decision on several untenable conclusions.

The Third Circuit stated in its opinion that *Wiley* justified the district court's picking and choosing which terms of the labor agreement it would enforce.[4] Yet, this Court in *Wiley* made no such determination, but limited its decision to a holding that a federal court could order enforcement of the arbitration clause. In fact, as pointed out in footnote 21 of the Amicus Brief filed by the Chamber of Commerce in this case, this Court in *Wiley* refused to adopt such a determination.[5]

The Third Circuit appears to place reliance on the theory that national labor policy as expressed in Section 8(d) of the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, constrains only the National Labor Relations Board and does not reflect a legislative endorsement uniformly applicable to the Board and the federal courts. Yet, the Third Circuit grudgingly recognized that the policy of freedom of contract embodied in Section 8(d) has a broader scope than mere application to the Board. The Third Circuit's mistaken assumption about the breadth of Section 8(d) has been treated in Petitioner's earlier briefs.

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[4] See footnote 26 of the Third Circuit's decision.

[5] It is important to note that as recently as the *Burns* decision, this Court specifically stated that *Wiley* "held only that the agreement to arbitrate ... survived the merger ... ." 406 U.S. at 286.

To justify its expansive interpretation of *Wiley*, the Third Circuit characterized this Court's *Burns* decision as "exceedingly narrow". Yet, it was the *Wiley* decision which this Court in *Burns* held was a "limited accommodation" between freedom of contract and judicial preference of arbitration, and *Burns* spoke of *Wiley* as a narrow holding. 406 U.S. at 286. Moreover, this Court's statements in *Burns* relative to *Wiley's* limited impact are contained in that portion of Justice White's opinion wherein this Court specifically stated:

> Holding either the union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. 406 U.S. at 287.

The policy considerations discussed in *Burns* may not be applicable in *Bill's Trucking* if the same employer and the same employees were involved after transfer of stock ownership - a factual determination still to be made - but the dicta of the Third Circuit as to the meaning of *Wiley* and *Burns* is erroneous.

In its decision, the Third Circuit failed to address the issue of employee majority status. This failure may be warranted should it be determined on remand that the same employer was at all times involved. However, its failure to direct the District Court to determine employee majority status in deciding successorship is contrary to the decision of this Court in *Burns* and other decisions cited in Petitioner's briefs, and reflects a fundamental misunderstanding of the successorship concept.

Nearly all of *Bill's Trucking* that would be pertinent to this case is mere dicta, for the Third Circuit only remanded the case for a factual hearing to determine whether the same employer was involved, the status of employees, and the continuity of the business. But the dicta in *Bill's Trucking* demonstrates the difficulties engendered for federal courts when they fail to heed this Court's repeated statements that *Wiley* is a carefully circumscribed decision which does not run counter to Section 8(d) and the national

labor policy expressed therein.[6] The Third Circuit says it narrowly construed the *Burns* holding that the collective bargaining agreement does not survive an actual change in employers. If the Third Circuit is telling the District Court that it can make a contract for a successor employer by finding that "all, some, or none" of the labor contract provisions apply, and then award damages for breach of such provisions, it is ignoring *Burns* altogether.

U. S. Gypsum

The *Gypsum* case commenced in 1965 when Gypsum acquired the plant and a substantial part of the assets of another company. Gypsum engaged in operations identical to those of the seller, and to this end hired substantially all of the former employees and supervisors. The union which formerly represented the employees and was a party to a collective bargaining contract with the seller demanded recognition and application of the agreement. Upon Gypsum's refusal to recognize either the union or the agreement, the union brought suit under § 185 to compel arbitration of certain grievances and filed a § 158 (a) (5) charge with the Board alleging refusal to bargain.[7] Simultaneously, Gypsum filed a decertification petition with the Board, which ordered an election

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[6] The Third Circuit attempted to justify its position on alleged implications drawn from *Wiley*:

> Though the holding in *Wiley* was necessarily limited to establishing the successor's contractual duty to arbitrate, the case, as a practical matter, implies more. This is manifest from the fact that the very question upon which the successor must, under *Wiley*, submit to arbitration, is the extent to which the *other* terms of the predecessor's contract are binding on the successor. 85 LRRM at 2716.

Yet, this Court in *Burns* specifically rejected any such implications arising from *Wiley* which would permit the imposition of labor agreements.

[7] This charge was subsequently withdrawn when the union decided to seek contract enforcement rather than obtain a bargaining order. During arbitration, counsel for the union clearly recognized the forum - shopping involved:

> Of course, we wished and preferred to have our contract in effect rather than to get an order to bargain from the Board because in our contract, as I commented a moment ago, we had a checkoff provision. And if we could have succeeded in having our contract and our arrangements enforced by the Court's order, it was preferable to use rather than to have the Board's order . . . 85 LRRM at 2964.

despite the union's claim of contract bar.[8] Notwithstanding the Board proceedings, the Fifth Circuit ordered arbitration, predicating its decision on *Wiley*.[9] Thus under the Board's standard, the union was required to put its claim to representation to a vote,[10] while under the Court's standard, the union was allowed to enforce its contract.

In the arbitration proceeding, the arbitrator found that the recognition and dues check-off clauses in the collective bargaining agreement were applicable to the successor employer during the period commencing with the time the successor employer began operations and terminating when the union was decertified. The arbitrator also found that the company had breached a provision of the collective bargaining agreement which provided for re-opening the contract for negotiation as to a wage increase in the third year of the contract, and held that the employer was obligated to pay an increase which the arbitrator decided would have been agreed upon if the employer had negotiated as obligated by the contract.

The employer refused to abide by the arbitrator's decision, and new legal proceedings were commenced in United States District Court for enforcement of the arbitrator's award. After a court order enforcing the award in part, the matter was again heard by the Court of Appeals.[11] The Court now holds that the arbitrator was authorized, on the basis of *Wiley*, to find that parts of the collective bargaining agreement were applicable to the successor employer and that it had breached such contract obligations. It, therefore, enforces the arbitrator's award in total, although remanding the case to the district court for a determination as to an award of attorneys' fees to the union.

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[8] The Board deemed it unnecessary to decide the continuing viability of the contract, finding the purposes of the Act (e.g., protection of majority choice) best effectuated by ordering an election.

[9] *U. S. Gypsum Co.* v *Steelworkers*, 384 F2d 38 (5th Cir., 1967) cert. den. 389 U. S. 1042 (1968).

[10] The union lost the election and was decertified.

[11] The length of this legal battle from its inception in 1965 until 1974 illustrates that suit under §185 does not, in successorship cases, afford a means for expeditious resolution of labor disputes, contrary to the claims of Respondent.

Gypsum does not involve one of the central issues in the instant case. Gypsum was admittedly a successor employer, since it had purchased a substantial part of the assets of the predecessor employer, continued the same business, *and employed the same employees, including supervisors.* Indeed, the earlier decision in the case was cited by Petitioner as one of the large number of cases which establish that it is a condition precedent to finding successorship that a majority of a new owner's work force consist of employees of the former owner. Since Petitioner, exercising its right to determine its work force, hired none of the former owner's employees in one of the bargaining units involved and a minority of the employees in the other bargaining unit, it should not be found to be a successor.

On a second issue presented in this case (one which need not be reached if it is found that Petitioner is not a successor), the decision of the Fifth Circuit, rationalizing *Wiley* and *Burns*, is more troublesome. The Fifth Circuit holds that despite *Burns'* conclusion that the collective bargaining agreement does not continue in effect after a change of employers, the arbitrator could enforce against the successor provisions of the contract of the predecessor. However, the Court was clearly troubled by this conclusion, for it stated:

> Reading the Burns opinion as a whole could justifiably leave one with the conviction that it presages a similar holding to the effect that an arbitrator, operating within the same basic framework of national labor policy as the board, does not generally have the power to bind a successor to substantive provisions of a collective bargaining agreement to which it is not a party. We decline, however, to adopt that position at this juncture. 85 LRRM at 2970, 71.

In its footnote 20, the Court states:

> After an exhaustive analysis of the doctrine of successorship, both in board cases and § 301 cases, one commentator concludes as follows: "By reading Wiley and Burns together and giving vitality to each, the conclusion seems inescapable that the substantive terms of the contract survive, whether by decision of the arbitrator or the NLRB, only if

> the successor in word or deed manifests an intent to be bound thereby." Slicker, supra, note 17 at 1102; accord Pate, supra, note 17, at 693. Contra, Note; supra, note 17, at 577; The Supreme Court, 1971 Term, supra, note 17, at 256.

It then continues with a statement by Dean St. Antoine:

> On still a deeper level, Burns reflects a clash between certain fundamental values in the labor field. On the one hand, there is a concern about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There is also a concern about maintaining industrial stability and labor peace, through reducing the number of representation elections and sustaining the life of labor agreements. On the other hand, stress is laid on the freedom and voluntariness of the collective bargaining process, on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress is further laid on providing maximum flexibility in business arrangements, so that employers may respond to changing market conditions without being straitjacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. *The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance out these competing values than on any logical deductions from Wiley and Burns.* (emphasis in original). 6 Mich. J. L. Ref. 269,277.

The Fifth Circuit should indeed be troubled, for its decision cannot be reconciled with the unanimous result of this Court in *Burns* nor with the policies expressed by Mr. Justice White.

The dichotomy discussed at length in Petitioner's brief will continue to exist if in cases coming from NLRB it is held, as in *Burns*, that the contract does not continue in effect, but in cases coming from the courts it is held, as in *Gypsum*, that an arbitrator can apply and enforce provisions of the contract, and in cases such as *Bill's Trucking*, a U.S. District Court, lacking the flexibility and expertise of an arbitrator, can determine which contract provisions are applicable and award damages for breach of such provisions. A uniform rule should apply, and it should be the rule enunciated by this court in *Burns*.

CONCLUSION

The decision of the court below should be reversed.

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MAY 24 1974

No. 73-631

Supreme Court of the United States

October Term, 1973

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER AND RESPONDENT'S REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER

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DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER

Detroit Local Joint Executive Board, the respondent in this case, pursuant to Rule 41(5) & (6) of the Rules of this Court, hereby moves for leave to file the accompanying reply to the supplemental brief for petitioner. In support of this motion the Union shows as follows:

When the decision in *United Steelworkers* v. *United States Gypsum Co.*, —— F.2d ——, 85 LRRM 2962 (C.A. 5, April 11, 1974) (hereafter "*Gypsum*") appeared, we considered filing a supplemental brief calling that case to this Court's attention. However, we forbore to do so, because we had already filed a supplemental brief with re-

spect to the decision in *Teamsters Local 249* v. *Bill's Trucking, Inc.*, —— F.2d ——, 85 LRRM 2713 (C.A. 3, March 13, 1974) (hereafter "*BTI*"). However, given the filing of Howard Johnson's supplemental brief discussing *Gypsum*, a reply is called for.

CONCLUSION

For the above-stated reasons this motion for leave to file a reply to the supplemental brief for petitioner should be granted.

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DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S REPLY TO THE SUPPLEMENTAL BRIEF FOR PETITIONER

1. The central issue in this case is whether, as Howard Johnson insists, this Court's decision in *NLRB* v. *Burns Security Services,* 406 U.S. 272 (hereafter *"Burns"*), entirely eliminated the obligation of a successor to adhere to the arbitration clause in his predecessor's collective bargaining agreement, as declared in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (hereafter *"Wiley"*), or whether, as we submit, *Burns* only approved the pre-*Wiley* holdings that the National Labor Relations Board is without power to impose an obligation on the successor to honor the entire contract.

In considering that question the *Gypsum* decision (H.J. Supp. Br. p. 3, 7-9) is instructive in two respects:

First, and most obviously, it shows that the Fifth Circuit, like the Sixth in this case and the Third in *BTI* (H.J. Supp. Br. pp. 3-6), understood *Burns* as delineating only the Board's powers and not those of the courts or the arbitrators. (85 LRRM at 2967-2973.)

Second, *Gypsum*, demonstrates that arbitrators can fulfill the role envisaged for them in *Wiley* in a principled fashion which permits meaningful review by the courts (85 LRRM at 2965-2967, 2973-2978), and thereby confirms this Court's expression of confidence in *Wiley* "that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the [successor's] plant," (376 U.S. at 551-552, n. 5). Indeed, that observation was made in rejecting the same objection which U.S. Gypsum raised (84 LRRM at 2965), and which Howard Johnson maintains here (H.J. Supp. Br. pp. 6-9)—that enforcement pursuant to § 301 of the arbitration provision of a predecessor's contract against his successor would be inconsistent with the representation provisions of the National Labor Relations Act. The answer was and remains *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, cited in *Wiley*, 376 U.S. at 551-552, n. 5). (See the discussion at pp. 28-29 of our main brief.) Thus, the resulting "dichotomy" to which the Company objects (H.J. Supp. Br. p. 9) inheres in the statutory scheme, see pp. 33-34, n. 15 of our main brief and pp. 3-10 of the brief *amicus curiae* of the AFL-CIO, citing *inter alia*, *NLRB* v. *C & C Plywood*, 385 U.S. 431 and *NLRB* v. *Strong*, 393 U.S. 357, to which the Company has never made any response. To those precedents we can now add *William E. Arnold Co.* v. *Carpenters*, —— U.S. ——, 42 U.S.L.Wk. 4754 (May 20, 1974). In *Arnold*, as in *C & C Plywood*, 385 U.S. at 427-428, this Court em-

phasized "the congressional purpose that § 301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike,' " (Sl. Op. p. 6, & see *id.* at p. 4). Yet Howard Johnson would have it that the limitations on the Board's authority to enforce contracts recognized in *Burns* are also controlling in the "primary" forum for vindicating arbitration agreements—the courts.[1]

2. The other issue which Howard Johnson has raised in this case is whether, since the company refused to hire most of its predecessor's employees, it is a successor. Admittedly (H.J. Supp. Br., p. 8), that issue was not involved in *Gypsum*. It was, however, decided in *BTI*, and adversely to Howard Johnson's position here. (85 LRRM at 2713-2714, 2717-2718.) Howard Johnson would have it that the ruling of the Third Circuit that BTI would be a successor even though it chose to hire none of ETI's employees was *dictum*: "The Court of Appeals concluded that, based on the union's complaint, the employer involved 'was in reality the same corporation with which the union had a contract' [citing 85 LRRM at 2718], and that the employer dismissed its employees either on the day the transfer of stock took place or the next day." (H.J. Supp. Br., p. 3, footnote

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[1] The Company cites (H.J. Supp. Br., p. 9) an article by Dean St. Antoine which was quoted in *Gypsum*. With due respect to this author, his article can afford little guidance in the present case. Because the thrust of Dean St. Antoine's article was that *Burns* was wrongly decided given *Wiley*, he did not analyze the question presented in this case in the terms in which it is necessarily before this Court—that *Burns* was correctly decided, but that its holding fairly read does not govern in the § 301 context, which, indeed, was carefully distinguished from the § 8(d) context in which *Burns* arose, (see 406 U.S. at 285-286).

omitted.) But, Howard Johnson's quotation stops before the Third Circuit's recital of the union's alternative allegation, "that BTI at least represented a 'substantial continuity' of business enterprise from ETI to BTI," (85 LRRM at 2718). *BTI* thus follows the *Wiley* test of successorship—whether there is a "lack of any substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551)—and remands to the District Court to afford the union an opportunity to prove its case under that test (85 LRRM at 2718).

On the merits of the successorship issue Howard Johnson once again asserts that in the "exercis[e of] its right to determine its work force, [it] hired none of the former owner's employees in one of the bargaining units involved and a minority of the employees in the other bargaining unit, [and that therefore] it should not be found to be a successor." (H.J. Supp. Br., p. 8.) The Company has never identified the source of this claimed "right," be it the contract, a statute, or some brooding omnipresence in the sky. The only employer "prerogative" which this Court has recognized is that of "owners independently to rearrange their business and even eliminate themselves as employers"; and in light of "the objectives of national labor policy" this Court has also recognized that *that* prerogative must "be balanced by some protection to the employees from a sudden change in the employment relationship," (*Wiley*, 376 U.S. at 549). Yet, the Company would pyramid its acknowledged prerogative into a right to destroy the employees' legitimate expectations under a collective bargaining agreement, including the basic right thereunder to retain a job except when discharged for just cause. Indeed, Howard Johnson's theory of the *Wiley* successorship doc-

trine would provide an affirmative incentive to an employer who takes over another's business to rid himself of all or at least a majority of his predecessor's employees. The unanimous decision of this Court in *Wiley* is not to be thus turned against itself.[2]

[2] In the main, rather than deal with the aspects of *BTI* and *Gypsum* that parallel this case, Howard Johnson dwells on the differences since those cases required the resolution of difficulties not present here: In *BTI* the absence of an arbitration provision which meant that the District Court was required to determine the extent to which the substantive provisions of the contract survive (H.J. Supp. Br. pp. 4-6); and in *Gypsum* the decertification of the union in an NLRB election in which the predecessor's employees (who had been retained) voted (H.J. Supp. Br. pp. 6-7, 9). But in this case there is an arbitration clause and there is no evidence that the employees of Grissoms (Howard Johnson's predecessor) were in any way dissatisfied with the Union. Thus those portions of Howard Johnson's argument merely indicate that *BTI* and *Gypsum* are harder cases from the union standpoint than the instant case.

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Syllabus

HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–631. Argued March 19–20, 1974—Decided June 3, 1974

Petitioner purchased the assets of a restaurant and motor lodge under an agreement whereby the sellers, who had been operating the enterprises under franchises from petitioner, retained the real property and leased it to petitioner, and petitioner expressly did not assume any of the sellers' obligations, including those under any collective-bargaining agreement. Deciding to hire its own work force to operate the enterprises, petitioner hired 45 employees, but only nine of the sellers' 53 former employees and none of the former supervisors. Respondent union, which had collective-bargaining agreements with the sellers containing arbitration provisions, filed an action under § 301 of the Labor Management Relations Act, claiming that petitioner's failure to hire all the sellers' employees constituted a "lockout" in violation of the agreements and seeking injunctive relief and an order compelling petitioner and the sellers to arbitrate the extent of their obligations to the sellers' employees under the agreements. The District Court held that petitioner was required to arbitrate, but denied the union's motion for a preliminary injunction requiring petitioner to hire all of the sellers' employees. The Court of Appeals affirmed the order compelling petitioner to arbitrate. *Held:* Petitioner was not required to arbitrate with the union in the circumstances of this case, since there was plainly no substantial continuity of identity in the work force hired by petitioner with that of the sellers, and no express or implied assumption of the agreement to arbitrate. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, distinguished. Petitioner had the right not to hire any of the sellers' employees, if it so desired, *NLRB* v. *Burns Security Services*, 406 U. S. 272, and this right cannot be circumvented by the union's asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context. Pp. 253–265.

482 F. 2d 489, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 265.

James D. Tracy argued the cause and filed briefs for petitioner.

Laurence Gold argued the cause for respondent. With him on the briefs were *Jerry F. Venn, Donald Sugerman*, and *George Kaufmann*.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Once again we are faced with the problem of defining the labor law obligations of a "successor" employer to the employees of its predecessors. In this case, petitioner Howard Johnson Co. is the bona fide purchaser of the assets of a restaurant and motor lodge. Respondent Union was the bargaining representative of the employees of the previous operators, and had successfully concluded collective-bargaining agreements with them. In commencing its operation of the restaurant, Howard Johnson hired only a small fraction of the predecessors' employees. The question presented in this case is whether the Union may compel Howard Johnson to arbitrate, under the arbitration provisions of the collective-bargaining agreements signed by its predecessors, the extent of its obligations under those agreements to the predecessors' employees.

Prior to the sale at issue here, the Grissoms—Charles T. Grissom, P. L. Grissom, Ben Bibb, P. L. Grissom & Son,

**Gerard C. Smetana, Jerry Kronenberg*, and *Milton Smith* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Thomas E. Harris filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Inc., and the Belleville Restaurant Co., a corporation wholly owned by P. L. Grissom & Son—had operated a Howard Johnson's Motor Lodge and an adjacent Howard Johnson's Restaurant in Belleville, Michigan, under franchise agreements with the petitioner. Employees at both the restaurant and motor lodge were represented by the respondent Hotel & Restaurant Employees & Bartenders International Union.[1] The Grissoms had entered into separate collective-bargaining agreements with the Union covering employees at the two establishments. Both agreements contained dispute settlement procedures leading ultimately to arbitration. Both agreements also provided that they would be binding upon the employer's "successors, assigns, purchasers, lessees or transferees."

On June 16, 1972, the Grissoms entered into an agreement with Howard Johnson to sell it all of the personal property used in connection with operation of the restaurant and motor lodge. The Grissoms retained ownership of the real property, leasing both premises to Howard Johnson. Howard Johnson did not agree to assume any of the Grissoms' obligations, except for four specific contracts relating to operation of the restaurant and motor lodge. On June 28, Howard Johnson mailed the Grissoms a letter, which they later acknowledged and confirmed, clarifying that "[i]t was understood and agreed that the Purchaser . . . would not recognize and assume any labor agreements between the Sellers . . . and any

[1] Actually, employees at the restaurant were officially represented by the Hotel & Restaurant Employees & Bartenders International Union, while employees at the motor lodge were represented by Local 705 of the Hotel, Motel & Restaurant Employees Union. As the Court of Appeals observed, however, "[w]hile the unions named in the two agreements bear distinct names they are apparently identical in interest and governance." 482 F. 2d 489, 491 n. 3. Both have been represented throughout this litigation by the respondent Detroit Local Joint Executive Board.

labor organizations," and that it was further agreed that "the Purchaser does not assume any obligations or liabilities of the Sellers resulting from any labor agreements . . . ."

Transfer of operation of the restaurant and motor lodge was set for midnight, July 23, 1972. On July 9, the Grissoms notified all of their employees that their employment would terminate as of that time. The Union was also notified of the termination of the Grissoms' business. On July 11, Howard Johnson advised the Union that it would not recognize the Union or assume any obligations under the existing collective-bargaining agreements.

After reaching agreement with the Grissoms, Howard Johnson began hiring its own work force. It placed advertisements in local newspapers, and posted notices in various places, including the restaurant and motor lodge. It began interviewing prospective employees on July 10, hired its first employees on July 18, and began training them at a Howard Johnson facility in Ann Arbor on July 20. Prior to the sale, the Grissoms had 53 employees. Howard Johnson commenced operations with 45 employees, 33 engaged in the restaurant and 12 in the motor lodge. Of these, only nine of the restaurant employees and none of the motor lodge employees had previously been employed by the Grissoms. None of the supervisory personnel employed by the Grissoms were hired by Howard Johnson.

The Union filed this action in the state courts on July 21. Characterizing Howard Johnson's failure to hire all of the employees of the Grissoms as a "lockout" in violation of the collective-bargaining agreements, the Union sought a temporary restraining order enjoining this "lockout" and an order compelling Howard Johnson and the Grissoms to arbitrate the extent of their obliga-

tions to the Grissom employees under the bargaining agreements. The state court granted an *ex parte* temporary restraining order, but the Company refused to honor it, claiming that it had not received adequate notice or service, and the order was dissolved after a hearing on July 24.

The defendants subsequently removed this action to the federal courts on the ground that it was brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. At a hearing before the District Court on August 7, the Grissoms admitted that they were required to arbitrate in accordance with the terms of the collective-bargaining agreements they had signed and that an order compelling arbitration should issue. On August 22, the District Court, in a memorandum opinion unofficially reported at 81 L. R. R. M. 2329 (ED Mich. 1972), held that Howard Johnson was also required to arbitrate the extent of its obligations to the former Grissom employees. The court denied, however, the Union's motion for a preliminary injunction requiring the Company to hire all the former Grissom employees, and granted a stay of its arbitration order pending appeal. Howard Johnson appealed the order compelling arbitration, but the Court of Appeals affirmed. 482 F. 2d 489 (CA6 1973). We granted certiorari, 414 U. S. 1091 (1973), to consider the important labor law question presented. We reverse.

Both courts below relied heavily on this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). In *Wiley*, the union representing the employees of a corporation which had disappeared through a merger sought to compel the surviving corporation, which had hired all of the merged corporation's employees and continued to operate the enterprise in a substantially identical form after the merger, to arbitrate

under the merged corporation's collective-bargaining agreement. As *Wiley* was this Court's first experience with the difficult "successorship" question, its holding was properly cautious and narrow:

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.*, at 548.

Mr. Justice Harlan, writing for the Court, emphasized "the central role of arbitration in effectuating national labor policy" and preventing industrial strife, and the need to afford some protection to the interests of the employees during a change of corporate ownership. *Id.*, at 549.

The courts below recognized that the reasoning of *Wiley* was to some extent inconsistent with our more recent decision in *NLRB* v. *Burns International Security Services*, 406 U. S. 272 (1972). Burns was the successful bidder on a contract to provide security services at a Lockheed Aircraft plant, and took a majority of its employees from the ranks of the guards employed at the plant by the previous contractor, Wackenhut. In refusing to enforce the Board's order finding that Burns' failure to honor the substantive provisions of the collective-bargaining agreement negotiated with Wackenhut was an unfair labor practice, we emphasized that freedom of collective bargaining—" 'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract' "—was a " 'fundamental premise' " of the federal labor laws. *id.*, at 287, quoting *H. K. Porter Co.* v. *NLRB*,

397 U. S. 99, 108 (1970), and that it was therefore improper to hold Burns to the substantive terms of a collective-bargaining agreement which it had neither expressly nor impliedly assumed. *Burns* also stressed that holding a new employer bound by the substantive terms of the preexisting collective-bargaining agreement might inhibit the free transfer of capital, and that new employers must be free to make substantial changes in the operation of the enterprise. 406 U. S., at 287–288.

The courts below held that *Wiley* rather than *Burns* was controlling here on the ground that *Burns* involved an NLRB order holding the employer bound by the substantive terms of the collective-bargaining agreement, whereas this case, like *Wiley*, involved a § 301 suit to compel arbitration. Although this distinction was in fact suggested by the Court's opinion in *Burns*, see *id.*, at 285–286, we do not believe that the fundamental policies outlined in *Burns* can be so lightly disregarded. In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills* did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." *Id.*, at 456. MR. JUSTICE DOUGLAS described the process of analysis to be employed:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statu-

tory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, at 457.

It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims.[2] Clearly the reasoning of *Burns* must be taken into account here.

We find it unnecessary, however, to decide in the circumstances of this case whether there is any irreconcilable conflict between *Wiley* and *Burns*. We believe that even on its own terms, *Wiley* does not support the decision of the courts below. The Court in *Burns*, recognized that its decision "turn[ed] to a great extent on the precise facts involved here." 406 U. S., at 274. The same observation could have been made in *Wiley*, as indeed it could be made in this case. In our development of the federal common law under § 301, we must necessarily proceed cautiously, in the traditional case-by-case approach of the common law. Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate. The Court was obviously well aware of this in *Wiley*, as its guarded, almost tentative statement of its holding amply demonstrates.

When the focus is placed on the facts of these cases, it

[2] See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 255–256 (1972); Christensen, Successorships, Unit Changes, and the Bargaining Table, in Southwestern Leg. Found., 19th Institute on Labor Law, Labor Law Developments 1973, pp. 197, 205–206.

becomes apparent that the decision below is an unwarranted extension of *Wiley* beyond any factual context it may have contemplated. Although it is true that both *Wiley* and this case involve § 301 suits to compel arbitration, the similarity ends there. *Wiley* involved a merger, as a result of which the initial employing entity completely disappeared. In contrast, this case involves only a sale of some assets, and the initial employers remain in existence as viable corporate entities, with substantial revenues from the lease of the motor lodge and restaurant to Howard Johnson. Although we have recognized that ordinarily there is no basis for distinguishing among mergers, consolidations, or purchases of assets in the analysis of successorship problems, see *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 182–183, n. 5 (1973), we think these distinctions are relevant here, for two reasons. First, the merger in *Wiley* was conducted "against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation," *Burns*, 406 U. S., at 286, which suggests that holding Wiley bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties. Second, the disappearance of the original employing entity in the *Wiley* merger meant that unless the union were afforded some remedy against Wiley, it would have no means to enforce the obligations voluntarily undertaken by the merged corporation, to the extent that those obligations vested prior to the merger or to the extent that its promises were intended to survive a change of ownership. Here, in contrast, because the Grissom corporations continue as viable entities with substantial retained assets, the Union does have a realistic remedy to enforce their contractual obligations. Indeed, the Gris-

soms have agreed to arbitrate the extent of their liability to the Union and their former employees; presumably this arbitration will explore the question whether the Grissoms breached the successorship provisions of their collective-bargaining agreements, and what the remedy for this breach might be.[3]

Even more important, in *Wiley* the surviving corporation hired *all* of the employees of the disappearing corporation. Although, under *Burns*, the surviving corporation may have been entitled to make substantial changes in its operation of the enterprise, the plain fact is that it did not. As the arbitrator in *Wiley* subsequently stated:

> "Although the Wiley merger was effective on October 2, 1961, the former Interscience employees continued to perform the same work on the same products under the same management at the same work place as before the change in the corporate employer." *Interscience Encyclopedia, Inc.*, 55 Lab. Arb. 210, 218 (1970).[4]

[3] The Union apparently did not explore another remedy which might have been available to it prior to the sale, *i. e.*, moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective-bargaining agreements. See *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (SDNY 1971), vacated, 457 F. 2d 1127 (CA2 1972). The mere existence of the successorship clauses in the bargaining agreements between the Union and the Grissoms, however, cannot bind Howard Johnson either to the substantive terms of the agreements or to the arbitration clauses thereof, absent the continuity required by *Wiley*, when it is perfectly clear the Company refused to assume any obligations under the agreements.

[4] Subsequently, the Interscience plant was closed and the former Interscience employees were integrated into Wiley's work force. The arbitrator, relying in part on the NLRB's decision in *Burns*, held that the provisions of the Interscience collective-bargaining agreement remained in effect for as long as Wiley continued to operate

The claims which the union sought to compel Wiley to arbitrate were thus the claims of Wiley's employees as to the benefits they were entitled to receive in connection with their employment. It was on this basis that the Court in *Wiley* found that there was the "substantial continuity of identity in the business enterprise," 376 U. S., at 551, which it held necessary before the successor employer could be compelled to arbitrate.

Here, however, Howard Johnson decided to select and hire its own independent work force to commence its operation of the restaurant and motor lodge.[5] It there-

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the former Interscience enterprise as a unit in substantially the same manner as prior to the merger, but that the integration of the former Interscience employees into Wiley's operations destroyed this continuity of identity and terminated the effectiveness of the bargaining agreement. 55 Lab. Arb., at 218–220.

[5] It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum Co.* v. *NLRB*, *supra*; *NLRB* v. *Herman Bros. Pet Supply*, 325 F. 2d 68 (CA6 1963); *NLRB* v. *Ozark Hardwood Co.*, 282 F. 2d 1 (CA8 1960); *NLRB* v. *Lewis*, 246 F. 2d 886 (CA9 1957).

There is not the slightest suggestion in this case that the sale of the restaurant and motor lodge by the Grissoms to Howard Johnson was in any sense a paper transaction without meaningful impact on the ownership or operation of the enterprise. Howard Johnson had no ownership interest in the restaurant or motor lodge prior to this transaction. Although the Grissoms' operation of the enterprise as Howard Johnson's franchisee was subject to substantial restraints imposed by the franchise agreements on some aspects of the business, the franchise agreements imposed no restrictions on the

fore hired only nine of the 53 former Grissom employees and none of the Grissom supervisors. The primary purpose of the Union in seeking arbitration here with Howard Johnson is not to protect the rights of Howard Johnson's employees; rather, the Union primarily seeks arbitration on behalf of the former Grissom employees who were *not* hired by Howard Johnson. It is the Union's position that Howard Johnson was bound by the pre-existing collective-bargaining agreement to employ all of these former Grissom employees, except those who could be dismissed in accordance with the "just cause" provision or laid off in accordance with the seniority provision. It is manifest from the Union's efforts to obtain injunctive relief requiring the Company to hire all of these employees that this is the heart of the controversy here. Indeed, at oral argument, the Union conceded that it would be making the same argument here if Howard Johnson had not hired any of the former Grissom employees,[6] and that what was most important

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Grissoms' hiring or labor relations policies. There is nothing in the record to indicate that Howard Johnson had had any previous dealings with the Union, or had participated in any way in negotiating or approving the collective-bargaining agreements.

[6] "Question: . . . You say the man is a successor and therefore there never was a break in his contractual obligations. You've still got to make the case for the successorship.

"Mr. Gold [for the Union]: Well, that's right. I think our first duty is to show that there is a continuity of the business enterprise which makes it proper to say that the second employer is a successor.

"Where there isn't a continuity, then he is not a successor and he is not bound by the arbitration clause or any of the other potential obligations which are in the agreement.

"Question: But in deciding successorship, I take it you put aside the fact that he may not have hired *any* of the old employees?

"Mr. Gold: Yes, Your Honor . . . ." Tr. of Oral Arg. 37–38 (emphasis added).

to the Union was the prospect that the arbitrator might order the Company to hire all of these employees.[7]

What the Union seeks here is completely at odds with the basic principles this Court elaborated in *Burns*. We found there that nothing in the federal labor laws "requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer." 406 U. S., at 280 n. 5. See also *Golden State Bottling Co.* v. *NLRB*, 414 U. S., at 184 n. 6. *Burns* emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision." 406 U. S., at 287–288. We rejected the Board's position in part because "[i]t would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's

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[7] "Question: Well, isn't part of your submission . . . that the arbitrator could decide to put all 41 [employees who had been hired by Howard Johnson] back to work?

"Mr. Gold: Yes, Your Honor.

"Question: Which means that the successor does not have the right not to hire, that he must perhaps take over the old employees?

"Mr. Gold: Yes, Your Honor.

. . . . .

"Question: . . . [Y]ou still say that he may bring his own employees along.

"Mr. Gold: Well, no, one of the rules is that the just cause and seniority provisions of the agreement apply. That is probably the most important aspect of the bargain from the union and the employees' standpoint. And if——

"Question: You certainly are taking quite a bite out of *Burns*, I suppose, in these cases." Tr. of Oral Arg. 27, 33.

guards with its own except as the contract permitted." *Id.*, at 288. Clearly, *Burns* establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired.[8] The Union's effort to circumvent this holding by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted.

We do not believe that *Wiley* requires a successor employer to arbitrate in the circumstances of this case.[9]

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[8] See *Crotona Service Corp.*, 200 N. L. R. B. No. 97 (1972). Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8 (a)(3) of the National Labor Relations Act, 29 U. S. C. § 158 (a)(3). Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. See *NLRB* v. *Burns International Security Services*, 406 U. S. 272, 280–281, n. 5 (1972); *K. B. & J. Young's Super Markets* v. *NLRB*, 377 F. 2d 463 (CA9), cert. denied, 389 U. S. 841 (1967); *Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968). There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grissom employees because of their union membership, activity, or representation.

[9] The Court of Appeals stated that "[t]he first question we must face is whether Howard Johnson is a successor employer," 482 F. 2d, at 492, and, finding that it was, that the next question was whether a successor is required to arbitrate under the collective-bargaining agreement of its predecessor, *id.*, at 494, which the court found was resolved by *Wiley*. We do not believe that this artificial division between these questions is a helpful or appropriate way to approach these problems. The question whether Howard Johnson is a "successor" is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded to operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the inter-

The Court there held that arbitration could not be compelled unless there was "substantial continuity of identity in the business enterprise" before and after a change of ownership, for otherwise the duty to arbitrate would be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S., at 551. This continuity of identity in the business enterprise necessarily includes, we think, a substantial continuity in the identity of the work force across the change in ownership. The *Wiley* Court seemingly recognized this, as it found the requisite continuity present there in reliance on the "wholesale transfer" of Interscience employees to Wiley. *Ibid.* This view is reflected in the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the suc-

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ests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. See *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 181 (1973); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 244, 414 F. 2d 1135, 1140 (1969) (Leventhal, J., concurring); Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735 (1969); Comment, Contractual Successorship: The Impact of *Burns*, 40 U. Chi. L. Rev. 617, 619 n. 10 (1973).

Thus, our holding today is that Howard Johnson was not required to arbitrate with the Union representing the former Grissom employees in the circumstances of this case. We necessarily do not decide whether Howard Johnson is or is not a "successor employer" for any other purpose.

cessor in § 301 suits under *Wiley*.[10] This interpretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact retained in "[t]he transition from one corporate organization to another" from sudden changes in the terms and conditions of their employment, and with its belief that industrial strife would be avoided if these employees' claims were resolved by arbitration rather than by " 'the relative strength . . . of the contending forces.' " *Id.*, at 549, quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 580 (1960). At the same time, it recognizes that the employees of the terminating employer have no legal right to continued employment with the new employer, and avoids the difficulties inherent in the Union's position in this case. This holding is compelled, in our view, if the protection afforded employee interests in a change of ownership by *Wiley* is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force.

Since there was plainly no substantial continuity of identity in the work force hired by Howard Johnson with that of the Grissoms, and no express or implied assumption of the agreement to arbitrate, the courts below erred in compelling the Company to arbitrate the extent of its

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[10] See *Printing Specialties Union* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F. 2d 361, 363–364 (CA2 1971); *Wackenhut Corp.* v. *Plant Guard Workers*, 332 F. 2d 954, 958 (CA9 1964); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C., at 244 n. 4, 414 F. 2d, at 1140 n. 4 (Leventhal, J., concurring); *Boeing Co.* v. *International Assn. of Machinists*, 351 F. Supp. 813 (MD Fla. 1972); *Owens-Illinois, Inc.* v. *District 65, Retail, Wholesale, & Department Store Union*, 276 F. Supp. 740 (SDNY 1967); *Local Joint Executive Board, Hotel & Restaurant Employees* v. *Joden, Inc.*, 262 F. Supp. 390 (Mass. 1966). See also Comment, *supra*, n. 9, at 621.

obligations to the former Grissom employees. Accordingly, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner, Howard Johnson, in 1959 and 1960 entered into franchise agreements with P. L. Grissom, P. L. Grissom & Son, Charles T. Grissom, Ben Bibb, and the Belleville Restaurant Company (hereinafter collectively Grissoms) under which the franchise operated a Howard Johnson Restaurant and Motor Lodge. In 1968 Grissoms entered into collective-bargaining agreements with the respondent Union affecting both their restaurant and motel employees. On June 16, 1972, Grissoms sold the business to Howard Johnson, the transfer of management to take place on July 24, 1972. On June 28, Howard Johnson notified Grissoms that it would not recognize or assume their labor agreements and on July 9, 1972, Grissoms gave notice to their employees that they would be terminated at midnight, July 23. Howard Johnson began interviewing prospective employees in early July, and when it took over the operation on July 24 it retained only nine of Grissoms' employees; at least 40 were permanently replaced. The Union brought this action under § 301 of the Labor Management Relations Act, and the District Court issued an order compelling petitioner to arbitrate. The Court of Appeals affirmed, but today this Court reverses, holding that Howard Johnson was not a successor employer. I believe that the principles of successorship laid down in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, and *NLRB* v. *Burns International Security Services*, 406 U. S. 272, require affirmance, and thus I dissent.

Wiley was also a § 301 suit, to compel arbitration. There the company had merged with Interscience,

another and smaller publisher, 40 of whose employees were represented by the union. The union contended that the merger did not affect its right to represent these employees in negotiations with Wiley, and that Wiley was bound to recognize certain rights of these employees which had been guaranteed in the collective-bargaining agreement signed by Interscience. Wiley contended that the merger terminated the collective-bargaining agreement for all purposes and refused to bargain with the union. We held that the union could compel arbitration of this dispute under the arbitration provision of the collective-bargaining agreement even though Wiley had never signed the agreement. We pointed out that the duty to arbitrate will not in every case survive a change of ownership, as when "the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." *Wiley, supra,* at 551. But that was not the case in *Wiley:* "[T]he impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." *Id.,* at 550.

It must follow *a fortiori* that it is also not the case here. The contract between Grissoms and the Union explicitly provided that successors of Grissoms would be bound,[1] and certainly there can be no question that there

[1] "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law or by merger or consolidation with another com-

was a substantial continuity—indeed identity—of the business operation under Howard Johnson, the successor employer. Under its franchise agreement Howard Johnson had substantial control over Grissoms' operation of the business; [2] it was no stranger to the enterprise it took over. The business continued without interruption at the same location, offering the same products and services to the same public, under the same name and in the same manner, with almost the same number of employees. The only change was Howard Johnson's replacement of the Union members with new personnel, but as the court below pointed out, petitioner's reliance upon that fact is sheer bootstrap: "[Howard Johnson] argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees." 482 F. 2d 489, 493.

As we said in *Wiley*, "[i]t would derogate from 'the federal policy of settling labor disputes by arbitration,' . . . if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established . . . ." 376 U. S., at 549.

NLRB v. *Burns International Security Services*, *supra*, does not require any different result. There the

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pany provided the establishment remains in the same line of business." 482 F. 2d 489, 491.

[2] The motel franchise agreement provided, for example, that Howard Johnson would determine and approve standards of construction, operation and service, and would have the right at any time to enter the premises for that purpose; that prior approval would be required for equipment and supplies bearing the name "Howard Johnson"; that Howard Johnson would have the first option to purchase if the business were to be sold, and that in any event Howard Johnson must approve any successor. See the District Court opinion, 81 L. R. R. M. 2329, 2330, and App. 50a *et seq.*

original employer, Wackenhut, had a contract with Lockheed to provide security services, and at the expiration of that contract Lockheed took bids on providing the service and hired Burns to replace Wackenhut. Wackenhut employees had been represented by the union, but Burns, which hired 27 of the 42 Wackenhut guards, refused to bargain with the union or honor the collective-bargaining agreement signed by Wackenhut. We affirmed the NLRB's order requiring Burns to bargain with the union, but concluded that Burns was not bound by the substantive provisions of the collective-bargaining agreement between the union and Wackenhut. In distinguishing *Wiley*, we pointed out in *Burns* that unlike *Wiley* it did not involve a § 301 suit to compel arbitration, and thus was without the support of the national policy favoring arbitration. *Burns, supra*, at 286. Moreover, in Burns "there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations." *Ibid.*

All of the factors distinguishing *Burns* and *Wiley* call here for affirmance of the order to arbitrate. This is a § 301 suit, and Howard Johnson did purchase the assets from Grissoms. As a matter of federal labor law, when Howard Johnson took over the operation that had been conducted by its franchisee, it seems clear that it also took over the duty to arbitrate under the collective-bargaining agreement which expressly bound Grissoms' successors. Any other result makes nonsense of the principles laid down in *Wiley*. The majority, by making the number of prior employees retained by the successor the sole determinative factor, accepts petition-

er's bootstrap argument. The effect is to allow any new employer to determine for himself whether he will be bound, by the simple expedient of arranging for the termination of all of the prior employer's personnel. I cannot accept such a rule, especially when, as here, all of the other factors point so compellingly to the conclusion that petitioner is a successor employer who should be bound by the arbitration agreement.